

*United States Court of Appeals
for the Second Circuit*



**PETITION FOR
REHEARING
EN BANC**

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74-1220

IN THE
United States Court of Appeals
For the Second Circuit

No. 74-1220

UNITED STATE OF AMERICA,

Plaintiff-Appellee,
against

VINCENT ALOI,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

**PETITION FOR REHEARING AND
REHEARING EN BANC**

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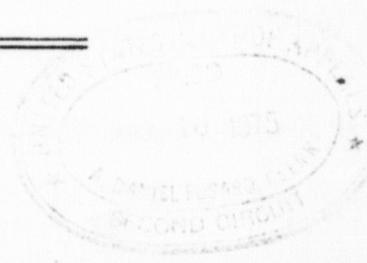


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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA, : :

Plaintiff-Appellee, : :

-against- : Docket No.
VINCENT ALOI, : 74-1220

Defendant-Appellant. : :

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PETITION FOR REHEARING AND
REQUEST FOR REHEARING EN BANC

PRELIMINARY STATEMENT

This is a petition for rehearing and request for rehearing en banc of a decision rendered by this Court¹ (Moore and Feinberg, C.C.J., and Palmieri, D.J.) on January 31, 1975, affirming a conviction for one count of conspiracy, one count of wire fraud, and one count of "use

¹For the convenience of the Court, the decision is attached hereto as Appendix A. Citations will, however, be to the page number of the slip opinion as it is reproduced there.

of a false offering circular." That conviction was entered in the United States District Court for the Southern District of New York (Knapp, J., and a jury).²

The opinion rendered by the Court contains misstatements of fact, conclusions of law in conflict with the prevailing law of this Circuit, and completely omits any mention of several crucial arguments advanced by Aloi. While we realize that the case was extremely complex,³ and the Court's reviewing task a difficult one,⁴ we are respectfully constrained to request a rehearing on issues which were not considered, or where facts were misstated, and a rehearing en banc on issues where there is now a conflict among panels, or where the issues are of such significance that they are best determined by the entire Court.

The points of law or fact which, in the opinion of appellant, the Court "has overlooked or misapprehended" (Fed. Rules App. Proc.,

²Aloi was sentenced to five years on the conspiracy count, and four years on the use of a false offering circular count, those sentences to run consecutively to each other, and consecutively to a seven-year state sentence. A five-year sentence on the wire fraud count was suspended.

³The total transcript was in excess of six thousand (6000) pages.

⁴The problem was compounded by the filing of four lengthy briefs, each raising separate and non-redundant issues, with many issues cross-referenced and adopted by reference by other particular appellants. This technique, which was adopted to spare the Court unnecessary repetition, may well have caused it to miss certain issues raised by one appellant in the total context of another appellant's case.

Rule 40[a]), are, briefly as follow, and will be discussed, infra in the same order.⁵

1) The conviction on count 18 must be reversed because in failing to charge "wilfulness" the court omitted an element of the crime which the government had to prove beyond a reasonable doubt.

a) The failure to charge an essential element is, under the clear law of this Circuit, "plain error" which requires reversal.

b) The Court was factually mistaken in its conclusion that the appellants failed to preserve their objection under Rule 30, F.R.Cr.P.

2) The conviction on count 18 cannot stand because:

a) The Court adopted an entirely novel construction for the term "use," which conflicts with ordinary statutory interpretation and common understanding of the term; and

b) The Court completely ignored Alois crucial argument that, under United States v. Cantone, 426 F.2d (2d Cir., 1970), the trial court's charge of "issuance" rather than "use" relieved him of any and all derivative Pinkerton liability because he was not a member of the conspiracy at the time the circular was "issued."

3) The Court was factually mistaken in finding that the government had responded adequately to the trial court's orders for disclosure of electronic surveillance because:

a) The government never responded to the orders as to state wiretapping known to it; and

b) The unsworn denial of federal surveillance was completely inadequate under the present law of this Circuit, including United States v. Toscanino, 500 F.2d 265 (2d Cir., 1974), and any change in that law requires en banc consideration.

⁵The order chosen in no way suggests the importance which we assign to any particular claim of error.

- 4) Of the five sentencing arguments made by Aloi, the Court dealt with only one; the remaining arguments, raising the gravest constitutional questions as to due process in the sentencing procedure, deserve consideration by the Court en banc.
- 5) The Court's opinion, permitting impeachment by a conviction not yet subject to the first stage of appellate review, is in conflict with another decision of this Court, and requires en banc consideration for its resolution.
- 6) The Court's opinion, finding a generalized one sentence charge adequate to protect a defendant from massive amounts of enormously prejudicial evidence inadmissible as to him, after denying his repeated motions for severance in a close case, is in conflict with numerous decisions of this Circuit and requires en banc consideration.
- 7) The Court ignored the government's failure to prove an essential element of the wire fraud count beyond a reasonable doubt, in violation of decisions in this and another Circuit.
- 8) The Court's own reading and summary of the record, made without the safeguards of the adversary process, still fails to disclose evidence sufficient to legally sustain Alois's conviction on the conspiracy count.

I.

**THE FAILURE TO CHARGE WILFULNESS AS
TO COUNT 18 WAS NOT WAIVED UNDER RULE 30,
AND WAS PLAIN ERROR UNDER THE LAW OF THIS CIRCUIT,
SO THAT CONVICTION ON THAT COUNT MUST BE REVERSED**

In addition to the conspiracy and wire fraud counts, appellant Aloi was convicted of count 18 of the indictment, which charged the "wilful

use of a false and misleading offering circular.⁶ Aloi's guilt on this count was predicated entirely on the derivative liability of Pinkerton v. United States, 328 U. S. 640 (1946);⁷ there was no evidence that he or any of the other defendants personally violated the statute. For his conviction on this count, Aloi was sentenced to an additional, consecutive four-year term. On appeal, Aloi raised a number of issues as to the legality of conviction on this count.

Two of these issues which clearly require reversal were misconstrued or decided in conflict with other cases in this Circuit, thus compelling rehearing and rehearing en banc.

A. The Failure to Charge Wilfulness

Aloi and the other appellants raised many objections to the trial court's failure to adequately define terms⁸ used in the indictment and

⁶In violation of 15 U. S. C. section 77(x), 77(S)(a), Rule 256(e) (17 C. F. R. section 230.256[e]), and Form 1A, Schedule I, as promulgated thereunder. The "unlawful use" was also charged as an object of the conspiracy under Count I of the indictment.

⁷Such derivative liability requires a finding both that the crime was actually committed (United States v. Cantone, 426 F.2d 902, 904 [2d Cir., 1970]) and that it was committed in furtherance of the conspiracy (Pinkerton, supra).

⁸Such as "undisclosed underwriter," etc. These claims, are, of course, not here abandoned. They are raised at Point II of Appellant Dioguardi's Brief, pp. 34-36.

in its charge. Entirely separate⁹ from these "definitional" omissions was the failure to charge that the crime of "use of a misleading offering circular" must have been committed wilfully.

The Court's opinion lumps all together¹⁰ and apparently disposes of them all on a theory that they were waived by defense counsel's failure to object pursuant to Rule 30, F.R.Cr.P.¹¹ This, however, ignores both crucial facts and the clear law of this Circuit, which this decision either ignores or overrules sub silentio.

Wilfulness is more than a statutory term; it is an essential element of the offense which the government must prove beyond a reasonable doubt. See, e.g., United States v. Byrd, 352 F.2d 570, 572-74 (2d

⁹This was raised in Dioguardi's brief at Point II(A), pp. 36-40 and was expressly adopted by reference by Alois. See Alois Br., pp. 21-22 and fns. 39 and 40 therein.

¹⁰The Court wrote: ". . . Dioguardi claims that the court should have defined the terms "fraudulent," "material" and "undisclosed underwriter" and should have been charged that any material omissions from the offering circular had to be willful" (Appendix A, Op. p. 6072).

¹¹At least this is what we assume the Court meant to do. After an intervening paragraph describing another claimed error, the Court wrote: "If error is 'plain' one might well ask: plain to whom? Apparently not to the experienced defense counsel during the trial. These counsel were given by the court a copy of its charge in another similar case and advised by the court that it proposed to give a somewhat similar charge as to the substantive counts. Rule 30, F.R.Cr.P. must be given some meaning. Its purpose is obvious, namely, to give the trial judge an opportunity to remedy any defences which counsel believe may exist" (id.). Apparently, then, the failure to charge wilfulness was deemed not to constitute reversible error since it was not "plain error" and could not be considered in the absence of an objection.

Cir., 1965); United States v. Ausmeier, 152 F.2d 349, 356-57 (2d Cir., 1945).¹²

The absolute necessity of proving wilfulness is apparent not only from the case law, but from the statutory scheme itself. The Securities Exchange Act of 1933, 15 U.S.C. sections 77(a) et seq is legislation aimed at informing the public; in pursuit of this goal, the Act permits various civil remedies, including injunctions and damages. See generally Loss, 1 Securities Regulations (1961). It is only Section 77(x) which makes violation of the Act a criminal offense, and that section specifically requires wilfulness as opposed to carelessness, mistake or the like.¹³

¹²A full discussion of these and other wilfulness cases from this Circuit is contained in Dioguardi's Br. at pp. 37-40.

¹³In this respect, the Securities Act is remarkably similar to the civil/criminal distinctions under the Internal Revenue Code (which provides for criminal penalties beginning at section 7201 et seq). There too, what might otherwise be mistaken as negligence by the taxpayer becomes criminal only when it is wilfully done. In that context, the Supreme Court has recognized that wilfulness involves "bad faith or evil intent," United States v. Murdoch, 290 U.S. 389, 398 (1933), or "evil motive and want of justification in view of all of the financial circumstances of the taxpayer." Spies v. United States, 317 U.S. 492, 498 (1943).

As the Supreme Court has recently reiterated, this is so because: "The Court's consistent interpretation of the word 'willfully' to require an element of mens rea implements the pervasive intent of Congress to construct penalties that separate the purposeful tax violator from the well-meaning, but easily confused, mass of taxpayers." United States v. Bishop, 412 U.S. 346, 361 (1973). This same rationale applies to the Securities Act.

For the jury to find that the crime charged in the indictment was committed, it had to find that it was committed wilfully,¹⁴ yet the court never once mentioned this in its charge. Instead, it charged:

I advise you as a matter of law, if you find that this circular did fail to make the disclosures mentioned in the indictment and that if such disclosures would in your judgment have been of material interest to a purchaser of the securities, the issuance of that prospectus would have violated the securities laws of the United States.

(A. 101, TR. 5495)

It is hornbook law in this Circuit¹⁵ that the failure to charge an essential element of the crime constitutes "plain error" requiring reversal in the absence of objection, e. g., United States v. Fields, 466 F.2d 119, 121 (2d Cir., 1972), and even in the presence of "overwhelming proof of the element not charged,"¹⁶ United States v. Howard, ___ F.2d ___ (Docket No. 74-1282, 2d Cir., November 15, 1974). The failure to charge an essential element is indeed error so plain that it will require reversal, even when it has not been raised by the parties on appeal. United States v. Houle, 490 F.2d 167, 171-72, fn. 10 (2d Cir., 1973).

¹⁴The facts would support a contrary finding by the jury -- i. e., that the omissions, etc. caused by Nelson and/or other coconspirators were not wilful, but were inadvertent or negligent. See Alo Br. pp. 26-27, Dioguardi Br. pp. 38-39.

¹⁵Other Circuits follow the same rule. See, e. g., Findley v. United States, 362 F.2d 92 (10th Cir., 1966).

¹⁶Such proof is not present in this case. See fn. 14, supra.

This is because:

If justice is to be done in accordance with the rule of law, it is of paramount importance that the court's instructions be clear, accurate, complete and comprehensible, particularly with respect to the essential elements of the alleged crime that must be proved by the government beyond a reasonable doubt.

(United States v. Clark, 475 F.2d 240, 248 (2d Cir., 1973))

Accordingly, Rule 30 does not bar review, and the conviction on count 18 must be reversed.

B. Rule 30 Does Not Bar Review Because
There Was No Failure to Object

In its opinion, the Court refers to a copy of a charge given by the trial court in a similar case,¹⁷ and finds the failure to object to this charge a violation of Rule 30. While such a charge was shown briefly to defense counsel, it was offered only as a guide to the judge's general approach and clearly not as to the way in which the elements of the crimes would be charged.¹⁸ Further, that charge involved no crimes in which wilfulness was a statutory element.¹⁹

¹⁷United States v. Soldano, et al., 71 Cr. 558 (S.D.N.Y., 1973)

¹⁸See the complete discussion of the intended purpose and limitations of this charge -- which was passed briefly among counsel at a bench conference, hardly "given" to them -- in Dioguardi's Reply Brief, at pp. 2-6.

¹⁹The Soldano indictment alleged no 77(x) count, so there was no indication that the Court would fail to charge wilfulness. Insofar as analogy could be trusted, the implication was precisely the opposite since in charging mail fraud counts under 18 U.S.C. sections 4341 and Pinkerton liability, Judge Knapp was scrupulous in defining the requisite statutory scienter and intent. e.g., Soldano charge, pp. 1416-19.

Finally, after being shown the previous charge, both sides submitted requests to charge on various issues. The government, tracking the statutory language, specifically requested a charge on wilfulness for count 18,²⁰ and the defendants, who did not oppose this request,²¹ were clearly entitled to rely on it.²² A request to charge, as well as an objection to a charge already given, preserves the issue for appellate review. Cf. United States v. Knippenberg, 502 F.2d 1056, 1061 (7th Cir., 1974); Chatman v. United States, 411 F.2d 1139 (9th Cir., 1969); United States v. Bynum, 485 F.2d 490, 503 (2d Cir., 1973).²³

Accordingly, the Court erred in finding that the "failure to object" barred review under Rule 30.

²⁰Copies of the government's requests to charge were handed up at oral argument; the specific request here mentioned is affixed to this rehearing petition as Appendices B and B1.

²¹While they did, of course, oppose others.

²²The judge failed to inform either government or defense counsel that he would not be using the requested charge, in violation of Rule 30. Reliance on having made the request, without a subsequent objection was, therefore, clearly justified.

²³These and many other cases indicate that alleged errors as to a charge are waived when there is neither a request to charge or an objection. That either should preserve the point is consistent with the rule's purpose -- to alert the trial judge to the proper charge so that he or she may give it.

II.

COUNT 18 -- "USE" OF A FALSE
AND MISLEADING OFFERING CIRCULARA. Definition of the Term "Use"

The indictment charged that the defendants "willfully used and caused to be used" a false offering circular.²⁴ Aloi argued extensively that the circulars²⁵ were never "used," in any common sense of the term, in that they were never shown or sent to prospective customers as required by S. E. C. regulations (Aloi Br. at pp. 27-29).

The government based its argument on inferences that the circulars were, in fact, mailed, but the Court forcefully agreed with appellants that no such inferences could be drawn from the record (Op. 6082, fn. 9).

In order, however, to sustain the conviction under count 18, the Court was forced to stretch for an entirely novel -- and, we contend, completely unjustified -- construction of the term "use."

The Court's language must be carefully considered. It wrote:

To be sure, the offering circular was not used in the manner normally to be expected, namely, mailed to prospective purchasers before sale [sic] were consummated. But having been filed

²⁴In violation of 17 C. F. R. 230.256(e), promulgated pursuant to 16 U. S. C. section 77(s) and made criminal by 16 U. S. C. section 77(x). See infra.

²⁵Whose "material misrepresentations" were also not conceded. See Aloi Br. at pp. 22-26.

with the SEC, it was the genesis of the subsequent plan to defraud, and, facially at least, the existence of the filed circular lent an aura of legitimacy to the scheme.

(Op. p. 6082; emphasis added;
footnote omitted)

Use is thus defined for the first time as either "filed" or "existing." The former construction is completely erroneous under the very regulation sought to be construed²⁶ and the latter definition not only offends all notions of common sense and usage, but, if seriously adopted, would cause the crime to be invalidated either as unconstitutionally vague or as a prohibited ex post facto offense. In no event should so novel and strained a construction²⁷ result in imprisonment for a term of four years.²⁸

²⁶The regulation in whose violation is charged specifically employs the terms "prepared," "filed" and "used" separately; clearly the latter may not, in an immediately succeeding sentence, subsume all the former. The regulation reads as follows: "(e) If the offering is not completed within nine months from the date of the offering circular, a revised offering circular shall be prepared, filed and used in accordance with these rules as for an original offering circular, except that in the case of offering under stock purchase, savings, stock option or other similar plans for the benefit of employees, if the offering is not completed within 12 months from the date of the offering circular, a revised offering circular shall be prepared, filed and used in accordance with these rules as for an original offering circular. In no event shall an offering circular be used which is false or misleading in light of the circumstances then existing" (emphasis added).

²⁷And one which even the government, though prone to many fanciful theories, did not argue.

²⁸The four years imposed on this count 15 to run consecutively with five years on the conspiracy conviction.

B. Variance from the Charge

Even more serious than this sua sponte, post facto expansion of the term "use" is the fact that the jury was never instructed as to "use" at all. Instead, it was told only that if it found "issuance" it could convict the defendants, including Aloi, with guilt then solely premised on a Pinkerton theory.²⁹

We believe that the trial judge charged the narrower "issuance" rather than "use" because the record could support no more. But for whatever reason, and even assuming arguendo that "use" includes "issuance," his charge, as a matter of law, excluded Aloi from criminal liability. For there is no question that the circular was "issued,"³⁰ at the very latest, on April 8, 1970.³¹ By the government's theory, Aloi did not enter the conspiracy until June of 1970. As a matter of well settled law in this Circuit, he could not be held vicariously liable for acts of any co-defendants committed prior to that date, including issuance of a circular, United States v. Cantone, 426 F.2d 902, 904 (2d Cir., 1970). Accord, United States v. Knippenberg, 502 F.2d 1056,

²⁹ Pinkerton v. United States, supra.

³⁰ There is one other possible but extremely tenuous construction for issuance -- beyond the original writing, printing and filing -- and this is possible "issuance to prospective purchasers." As we know, however, no such "issuance" occurred. See supra at p. 11, and Op. p. 6082, fn. 9.

³¹ The date on which the circular was filed with the FCC.

1059-60 (7th Cir., 1974); United States v. Roberts, 416 F.2d 1215 (5th Cir., 1969).

In apparently considering Alois Cantone argument, the Court completely ignored the variance between the charge and the indictment and so did not (and could not) hold that the jury found Alois guilty of a crime on which it was never charged.³² United States v. Howard, supra.³³

The Court's complete failure to consider this crucial and dispositive argument requires both rehearing and reversal on count 18.

³²The jury may not constitutionally find guilt on a theory which the grand jury did not charge, Stirone v. United States, 361 U.S. 212 (1960); similarly, it may only constitutionally find guilt "where the proof adduced and the basis on which it was submitted were sufficient to support the verdict." Nye & Nissen v. United States, 336 U.S. 613 (1949). Once a fact is submitted to the jury it may only find guilt if it finds those facts charged; another theory, though valid, obviously will not suffice since the jury is bound by law to follow the court's instructions. See Nye & Nissen, supra. Cf. United States v. Zane, 495 F.2d 683, 691 (2d Cir.), cert. den., ___ U.S. ___, 43 U.S.L.W. 3239 (October 22, 1974) (jury bound by construction more restrictive than necessary). And see also United States v. Bollenbach, 326 U.S. 607, 613-65 (1946) where this Court was chastised because it ". . . evidently felt free to disregard the 'mistake in charge' only on its assumption [that the defendant could be convicted on another theory]." Id. p. 610.

³³The Howard decision was also brought to the Court's attention by letter from present counsel in December of 1974.

III.

ELECTRONIC SURVEILLANCE

Prior to trial, and on several occasions during it, Aloi and other appellants³⁴ moved for disclosure of any electronic surveillance of their conversations and premises. They alleged a number of convincing reasons for believing that such surveillance had probably occurred.³⁵ As a result of these allegations and requests, the trial court ordered the United States Attorney to make an inquiry of

. . . any telephone conversations you mention coming out of Dioguardi's office³⁶ or any other wire that the Government knows to be tapped.

(1953)

³⁴All motions made by a single defendant were deemed made by all defendants unless one specifically dissociated himself.

³⁵For example, Assistant Schreiber stated that there were prior taps of Dioguardi's phone, "unrelated" to this case (1951), and Mr. Wing similarly recalled taps on Dioguardi's phone (5354-56).

³⁶The significance of a tap on Dioguardi's office phone cannot be overestimated for the instant appellant. Hellerman, the "mastermind" testified as to conversations with Aloi and others over Dioguardi's phone, some of these being discussions of distribution of the proceeds of the fraud found so important by this Court (Op. pp. 6074-75). As defendants argued at trial, the likely existence of a tap on this phone might have shown either that no such conversations, or conversations other than those to which Hellerman testified, had occurred. See generally, Brady v. Maryland, 373 U.S. 83 (1963).

Additionally, and significantly, the court ordered Mr. Schreiber to determine whether there were any state wiretaps³⁷ and to check with other Assistants as to whether there had been wiretaps in previous related stock fraud trials involving the defendants.

Notwithstanding this Court's statement that there was

³⁷Aloi had, and has particular reason, expressed at every stage of these proceedings, to believe that he was the subject of state wiretapping conducted in conjunction with the Joint Organized Crime Task Force. For example, Assistant United States Attorney Wing stated that the New York City Police in conjunction with the Federal Strike Force had wiretapped certain of the defendants in the Imperial case (5355), a related Hellerman stock fraud in which Aloi was acquitted. The New York Times reported that the police had placed an eavesdropping device in the Nyack apartment where Vincent Aloi allegedly visited and which visit formed the basis for his State perjury conviction. New York Times, 39 (May 3, 1972).

The New York Times of May 2, 1974 reported the indictment of 117 people linked to the "five crime families" and stated that 63 wired rooms were monitored under court authorized wiretaps. New York Times, 1, 58, col. 3-4 (May 2, 1974). The majority of these wiretaps were aimed at the Colombo Family, in which Vincent Aloi was allegedly a high figure.

The likelihood of state taps was further reinforced by revelations in the press. See N. Y. L. J., June 26, 1974, p. 1, New York Led in 1973 Wiretap/Bug Orders. That article discloses the following relevant information: the major crime for which wiretap orders were sought was gambling and the leading county was Kings (Aloi is purportedly a high member of the "Colombo Family" whose "business" is gambling in Brooklyn). In 1973, 334 wiretaps were authorized by New York State judges, while only 17 taps were authorized by federal judges in the Southern and Eastern Districts. If the government's theory about Aloi is correct, it is inconceivable that he was not subject to state tapping.

Finally, the defendant's brother, Benedetto Aloi, was recently indicted for perjury in the state courts, and was presented with a list of court-ordered wiretaps on which he was overheard, including a social club in Brooklyn as described above. A copy of the District Attorney's "notice of overhearing" is attached hereto as Appendix C.

full compliance with the trial court's order and with the principles enumerated in *United States v. Smilow*, 472 F. 2d 1193 (2d Cir. 1973).³⁸ (Op. p. 6087)

none of the trial court's orders have ever -- to this date -- been obeyed.

First, and most obvious, the government never reported whether state wiretaps occurred or whether information from such wiretaps was used,³⁹ although they were ordered to do so repeatedly (See Tr. 1953-54, 3536-40, 4539). The Court's opinion makes no mention of this crucial claim by appellant or of the government's failure whatsoever.

This vital omission itself requires rehearing and a remand.

Second, the government's "compliance" with the judge's order on federal taps was totally inadequate both as a matter of fact and of law well settled in this Circuit.

After trial, and shortly before oral argument on appeal, the government sent the trial judge (and, eventually, appellant's counsel) a copy of an unsworn letter from the Department of Justice to Assistant

³⁸We fail to understand the reference to Smilow, where, as the Court noted, the case had to be remanded for a hearing to determine whether Smilow's conversations were the subject of wiretapping, whether such surveillance was illegal, and whether his prosecution was obtained from the "fruits" of such surveillance. This, of course, is precisely the remedy we request.

We do not read Smilow as setting forth standards; the standard case is clearly United States v. Toscanino, supra, with which we believe the instant decision is in complete opposition.

³⁹This, of course, would have been unconstitutional under Elkins v. United States, 364 U.S. 206 (1960).

United States Attorney Kaufman.⁴⁰ This purported "denial" was fatally flawed in numerous respects

1) It was a letter, not an affidavit, as required by this and other Circuits. United States v. Toscanino, 500 F.2d 267, 281 (2d Cir., 1974);⁴¹ United States v. Alter, 482 F.2d 1016 (9th Cir., 1973).

2) The inquiry made to the FBI was improperly narrow in that it requested taps only on "premises known to be owned, leased or licensed" by defendants. It is clear that under Katz v. United States, 389 U.S. 347 (1967) defendants may not be electronically surveilled in any place where they have a reasonable expectation of privacy.⁴²

3) The request made of the other listed agencies (see Op. p. 6086) is even more defective in that it asks only whether the defendants were "subjected" to electronic surveillance. The "denial" so obtained is impermissibly narrow under, e.g., Katz, supra and Alderman v. United States, 394 U.S. 179 (1969), 18 U.S.C. 3504, 18 U.S.C. 2512.⁴³

⁴⁰This letter was attached as Appendix A to Aloi's Reply Brief.

⁴¹The Toscanino case was specifically brought to the Court's attention by a letter from present counsel dated August 22, 1974.

⁴²For example, the government's inquiry omits the two companies for which Aloi worked, places where there might well have been taps, and where such taps, under Katz, would clearly have been illegal. The requirement that the agencies inquired of be listed, Toscanino, supra, is clearly aimed at revealing precisely this kind of situation.

⁴³As defendant is entitled to know whether or not the government "unlawfully overheard conversations of . . . himself or conversations occurring on his premises, whether or not he was present or participated in those conversations." Alderman, Id: Such inquiry was, of course, crucial, particularly as to the alleged conversations made by Hellerman over Dioguardi's phone.

4) The listed agencies significantly -- and without explanation -- omit those two most likely to have been involved here,⁴⁴ the Securities and Exchange Commission, and the Joint Organized Crime Task Force.⁴⁵

The claims raised by appellant clearly "triggered" 18 U.S.C. section 3504, United States v. Toscanino, supra, but those claims and the ensuing orders of the trial judge, have never been satisfied. Similarly, the requests and orders regarding state taps and taps at prior related trials⁴⁶ have been completely ignored by the government.

This Court's opinion is thus in factual error; such error has deprived appellant of his statutory and constitutionally guaranteed rights⁴⁷ and requires rehearing and a remand.

⁴⁴A prosecutor should inquire of all agencies empowered to conduct electronic surveillance under Title II and report their denials in written, affidavit form. Toscanino, supra; Vielguth v. United States, 502 F.2d 1257 (9th Cir., 1974); see United States v. Garvey, ____ F.2d ____ (Docket No. 74-1976, 9th Cir., June 27, 1974), and United States v. Halverson, ____ F.2d ____ (Docket No. 74-1977, 9th Cir., June 27, 1974); Korman v. United States, 486 F.2d 926 (7th Cir., 1973), In re Tierney, 465 F.2d 806 (5th Cir., 1972), cert. den., 410 U.S. 912 (1973).

⁴⁵See fn. 37, supra.

⁴⁶This relates particularly to the so-called "Imperial" trials. See Brief of Appellant Dioguardi at pp. 63-68.

⁴⁷Recent decisions of the Supreme Court and of this Court demonstrate conclusively that courts must be particularly scrupulous in determining claims of possibly illegal electronic surveillance. See, e.g., United States v. Giordano, ____ U.S. ___, 94 S.Ct. 1820; United States v. Capra, 501 F.2d 267 (2d Cir., 1974).

IV.

SENTENCING

In his main brief, Aloi argued five separate issues with regard to the illegality and unconstitutionality of his sentencing procedure (Aloi Br. pp. 71-72). All concerned grave questions of the constitutionality of various aspects of the process, and all were well supported by case law. In its opinion this Court considered only one -- perhaps the least important⁴⁸ -- of these issues.

We believe that in the rapidly developing area of sentencing law,⁴⁹ the issues raised are of sufficient importance to be considered by this Court en banc so that a constitutionally permissible procedure may be set down guiding the District Courts in their performance of this critical function.⁵⁰

⁴⁸In our argument as to the prosecutor's recommendations for sentence, we recognized that no prior cases set aside a sentence for a non-in-camera use of such report. We argued, however, that the inflammatory, unsupported information in the prosecutor's recommendations, coupled with similar information in the presentence report, was so prejudicial as to deny Aloi due process of law. Significantly, this point consumed only one page in a twenty page argument.

⁴⁹See cases cited infra.

⁵⁰See generally, Frankel, Criminal Sentences: Law Without Order (1973).

Because of the general importance of these issues,⁵¹ and rather than summarizing our arguments, we are, for the Court's convenience, appending the entire sentencing point as Appendix D hereto. We strongly urge the Court to carefully consider all issues briefed there.

In addition, several of the arguments made there⁵² have been further supported by decisions and commentary written since oral argument on the case. This material, which falls into two main categories, must also be considered on the issue of rehearing and remand for a new sentencing.⁵³

A. What Information May be Considered by a Sentencing Judge

As we previously argued (Aloi Br. pp. 77-80), a sentencing judge should not consider "evidence" of prior crimes or criminal behavior unless such crimes are verifiable from actual court records. See, e.g.,

⁵¹As we argued at pp. 83-86, the rationales of the progression of Supreme Court due process decisions from Kent v. United States, 383 U.S. 541 (1966) to Gagnon v. Scarpelli, 411 U.S. 778 (1973), strongly indicates that the sentencing process -- virtually unconsidered since Williams v. New York, 337 U.S. 241 (1949) -- will soon be considered and reassessed in light of those more recent constitutional decisions. The obvious gap in this area is one which this Court should fill now, since the requirements of due process set forth in previous Supreme Court cases make its resolution virtually inevitable.

⁵²And completely ignored by the Court's opinion.

⁵³As in United States v. Rosner, 485 F.2d 1213 (2d Cir., 1973), cert. den., 417 U.S. 950 (1974), we believe that only remand to a different judge would now permit a fair sentencing consistent with due process standards.

Baker v. United States, 388 F. 2d 931 (4th Cir., 1968), a position also taken by the American Bar Association, ABA, Project on Standards for Criminal Justice, Probation 37 (Approved Draft, 1970). The Fourth Circuit has recently reiterated this position, United States v. Looney, 501 F. 2d 1039 (4th Cir., 1974), holding that a sentence may not be based on information as to other crimes which lacks record support⁵⁴ or whose accuracy is not otherwise established. *Id.* at p. 1042.

The Weston case⁵⁵ which we relied upon has recently been cited with approval⁵⁶ in, e. g., United States v. Williams, 499 F. 2d 52, 55 (1st Cir., 1974). Its rationale which we argued⁵⁷ has been adopted by other courts,

⁵⁴The Court cited its prior decision in United States v. Powell, 487 F. 2d 325 (4th Cir., 1973) where the defendant was given a heavy sentence based on the judge's characterization of him as "ring-leader." Notwithstanding the general unreviewability of sentences, the Circuit found this determination unsupported by the record and accordingly remanded for a resentence.

Judge Knapp also gave Aloi an extraordinarily harsh sentence because he found him "equally responsible" with his co-defendant Dioguardi; but, as we argued previously (Aloi Br. p. 72, fn. 144), the record does not support this conclusion, nor does this Court's summary of facts (Op. at pp. 6059-63, 6066-74) which shows the defendant Lombardo (who received five years) to be far more involved than Aloi, though less than Dioguardi.

⁵⁵United States v. Weston, 448 F. 2d 626 (9th Cir., 1971), cert. den., 404 U.S. 1061 (1972).

⁵⁶It was, of course, also cited by this Court in United States v. Rosner, supra.

⁵⁷That any hearsay used at sentencing must pass a reliability test similar to the probable cause requirement for the issuance of a search warrant.

e.g. Nickens v. State, 34 Md.App. 284, 301 A.2d 49 (1973) and discussed approvingly by commentators, e.g., Note: Toward a Probable Cause Standard In Sentencing, 34 Md.L.Rev. 133 (1974).

As in Weston, the failure of the information in the presentence report to pass any test of reliability⁵⁸ requires that it must be disregarded; Aloi is, according, entitled to be resentenced by a judge whose opinion has not been tainted by such "fiction," e.g. United States v. Rosner, supra, Nichens v. State, supra.

B. The Right to a Hearing

Directly related to Aloi's claim that the material contained in the presentence report should not have been permitted to influence the sentencing judge was his request for an opportunity to cross examine the FBI agents whose "information" was reported there.⁵⁹

In addition to the general argument that present concepts of due process clearly require confrontation and cross examination in situations involving so substantial a loss of liberty, Aloi cited specific cases in

⁵⁸As Judge Knapp so aptly and damningly put it, ". . . the probation officer [who prepared the presentence report] said it was beyond his power to separate fact from fiction and I am afraid it is beyond my power too" (A. 153-54; emphasis added).

⁵⁹In this respect it must be noted that the presentence report in this case cannot be given deference as prepared by neutral, skilled professionals, since the material it contained came almost entirely from the completely partisan FBI. Cf. Gerstein v. Pugh, ___ U.S. ___, 43 U.S.L.W. 4230, 4234-35 (February 18, 1975).

which hearings with due process safeguards were required, e. g.,

United States ex rel Brown v. Rundle, 417 F.2d 282 (3d Cir., 1969).

Since his brief was filed, similar decisions have been reported both as to the general question of organized crime connections,⁶⁰ Catalano v. United States, ___ F.Supp. ___ (D.Conn., October 9, 1974), 16 Cr. L. Rptr. 2096,⁶¹ and as to

criminal conduct more serious than that for which the defendant was sentenced.

(United States v. Williams,
499 F.2d 52, 55 [1st Cir.,
1974])⁶²

⁶⁰According to the prosecutor and the presentence report, Aloi is alleged to be "the head of the [sic] organized crime family in New York (A134).

⁶¹Like Masiello v. Norton, discussed in our main brief (Aloi Br. p. 76, fn. 152), and now reported at 364 F.Supp. 1133 (D.Conn., 1973), the court there held that a prisoner could not be constitutionally classified as "O.C." (organized crime) with its concomitant deprivations without a hearing involving basic due process safeguards. In Catalano, the court held that cross examination would be required "where the decision maker cannot rationally determine the facts," Id., 16 Cr.L.Rptr. at p. 2097, a situation clearly present in Aloi's case where the judge could "not separate fact from fiction."

⁶²In Williams, the only criminal activity charged in the presentence report was that which is directly related to the crime of which defendant had been convicted. The court found that no further evidentiary hearing was required because at trial counsel had already had the opportunity to cross examine the two witnesses from whose allegations the sentencing material was taken.

The court, however, approved the holding in United States v. Weston, supra, that the government has a duty to substantiate challenged information that is unsupported and difficult to rebut. It further found that although an evidentiary hearing is not invariably required, "There may, of course, be circumstances where fairness requires one. See, e.g., Haller v. Robbins, 409 F.2d 857, 859-60 (1st Cir., 1969); United States ex rel. Brown v. Rundle, 417 F.2d 282, 285 (3d Cir., 1969)." Id. at p. 55, fn. 4.

See also United States v. Polizzi, 500 F.2d 856 (9th Cir., 1974) (hearing held where FBI agents examined on sources of information contained in presentence report).

The trend is thus clearly toward holding due process evidentiary hearings where material facts relied on are both unsubstantiated and controverted and this Court should so hold.⁶³

V.

IMPEACHMENT USE OF A NON-FINAL CONVICTION

While stating that

Apparently the circuits are in conflict on the impeachment use of a non-final (namely, still on appeal) conviction.

The Court ignored the fact that "apparently" differing panels within this Circuit are similarly in conflict. Such a conflict requires en banc consideration, and this case presents the precise facts required to truly decide "the broad question."⁶⁴

⁶³We are aware of the dicta in United States v. Rosner, supra, which is contrary to this general position. Aside from the particular facts of this case which make such a hearing a necessity, we believe that the Rosner court did not fully consider this issue (examination of Rosner's briefs show that no comprehensive Kent-Gagnon argument such as that made by Aloi was concluded), nor did Rosner request or argue the right of cross examination, and that this Court is accordingly not bound by it. Cf. United States v. Soles, infra.

⁶⁴See infra.

In 1970, a panel consisting of Judges Lumbard, Waterman and Kaufman decided United States v. Semensohn, 421 F.2d 1206 (2d Cir., 1970). The defendant in that case had been convicted on his plea of guilty of a misdemeanor, but the time to appeal or withdraw his plea had not expired at the time he was questioned about the conviction. The Court found the use of such conviction for impeachment purposes to be clearly improper,⁶⁵ citing with approval Campbell v. United States, 176 F.2d 45 (1949).

In 1973, another panel, composed of Judges Friendly, Feinberg, and Mansfield decided United States v. Soles, 482 F.2d 105 (2d Cir.), cert. den., 414 U.S. 1027 (1973) holding that a trial judge has discretion to permit impeachment by a conviction under appeal. The Semensohn decision was "distinguished" because it involved a misdemeanor; its favorable citation of Campbell⁶⁶ was discounted because

. . . the broader question [presumably a felony conviction] was not before the court,

⁶⁵As the Court wrote: "It is settled that in a trial a witness's acts of misconduct are not admissible to impeach his credibility unless the acts resulted in the obtaining of a conviction. It is also settled law that a conviction does not become a final conviction until sentence has been imposed and until the time for an appeal from the judgment has expired." *Id.* at p. 1208.

Accordingly, the Court found that Semensohn's prior conviction "lacked the certainty and finality to warrant its prejudicial use against him at trial." *Id.*

⁶⁶Which, of course, involved a felony, and which is the leading case for its particular proposition.

and the government had not called the court's attention to the majority view.

(Id. at p. 107)

Soles, however, also failed to present the "broader question" in that the conviction there was one which had already been affirmed by the Maryland appellate courts; only the possibility of discretionary review remained.⁶⁷

Aloi, for the first time presents the clear question of a felony conviction not yet subject to direct appellate review.⁶⁸ Despite the broad language in Soles, its facts are significantly different and its distinguishing of Semensohn unpersuasive. In applying the Soles decision to the instant facts, the instant Court is doing no less than overruling the rationale of Semensohn. Such a significant decision should not be made except by en banc consideration of the entire Court, so that the conflict in panels may be finally and appropriately resolved.

⁶⁷ The Court examined the "arguments" advanced by Soles in his certiorari petition, finding them irrelevant and frivolous. This fact no doubt influenced its expression of fear about "frivolous appeals and dilatory tactics." This was precisely the opposite situation from Aloi, whose conviction had not yet been subjected to the first stage appeal as of right; his appeal was demonstrably non-frivolous as the state courts had already granted bail relief upon issuance of a "certificate of reasonable doubt."

⁶⁸ A simple table demonstrates the relevant similarities and differences in the cases.

	Crime	Finality	Impeachability
Semensohn	Misdemeanor	No direct appeal	Inadmissible
Aloi	Felony	No direct appeal	Admissible (?)
Soles	Felony	Appeals exhausted	Admissible

VI.

PREJUDICIAL JOINDER AND INADEQUATE CHARGE

Aloi argued that he was prejudiced by a joint trial with Dioguardi both because of the latter's notoriety⁶⁹ and the extraordinarily prejudicial testimony adduced when Dioguardi took the stand. The latter was exacerbated when another co-defendant, Ralph Lombardo, also testified, and was also subjected to devastating cross examination about prior criminal acts and Mafia connections.⁷⁰

In addition to his arguments that a severance and/or mistrial should have been granted following admission of this evidence,⁷¹ Aloi argued that under well settled law, he was entitled to a charge that the jury must clearly disregard the extensive evidence adduced against Dioguardi and

⁶⁹ Many members of the venire, including one who finally sat on the jury, admitted to prior knowledge of Dioguardi as an underworld figure. Aloi continues to claim error as to the denial of a severance at this point and the judge's refusal to let the peremptory challenges be individually apportioned once a conflict among the defendants arose (Aloi Br. pp. 43-47). This issue is not dealt with in the Court's opinion.

⁷⁰ See Lombardo Br., Point IV, expressly adopted by Aloi at Aloi Br., p. 47, fn. 97.

⁷¹ We will not here restate those arguments found in our Brief at pp. 47-52, but adopt them in toto; the failure to restate should in no way be considered an abandonment.

Lombardo in considering his guilt.⁷²

The charge ultimately given as to this issue was so brief and non-specific⁷³ as to be entirely inadequate in protecting Aloi from a possible finding of "guilt by association." Under no circumstances could it be considered the "impregnable safeguard" required by United States v. Blumenthal, 332 U.S. 539, 559-60 (1947).

In its opinion, the Court cavalierly dismisses Aloi's position, stating:

Of course the trial judge could have consumed hours in analyzing every bit of evidence which applied only to a particular defendant, but the conclusion would not have been different from the charge as given.

(Op. at pp. 6079-80)

This totally unjustified and conclusory statement is completely at odds with all prior decisions of this Circuit, e.g., United States v. Bynum,

⁷²There can be no Rule 30 bar to this issue since throughout the trial the judge repeatedly assured counsel for Aloi that he would "take care of" such evidence in his charge, and counsel was entitled to rely upon such representation. Equally significant is the fact that in the Soldano charge, supra at p. 9, circulated by the judge, a similar situation was dealt with by a meticulous description of all evidence admissible against a single defendant and not against others -- precisely what we believe was required here.

⁷³The court charged: ". . . evidence offered or admitted only [sic] one defendant should not be considered in connection with your determination of the guilt or innocence of any other defendant." (Tr. 5479). Op. at p. 6080.

485 F.2d 490, 497-98 (2d Cir., 1973),⁷⁴ United States v. Kelly, 349 F.2d 720, 758-59 (2d Cir., 1965), cert. den., 384 U.S. 947 (1966)⁷⁵ and as such, requires en banc consideration and reversal.

VII.

COUNT 9 - WIRE FRAUD

Aloi was convicted of wire fraud on the basis of a telephone call allegedly made by his father to him and conducted entirely in Italian. Despite any proof whatsoever as to the content of the call, the Court wrote:

. . . despite the Vincent-Sebastian conversation being in Italian, the purpose of Graifer's visit to Sebastian, his conversation in English as to the problems facing the stock scheme⁷⁶

⁷⁴In Bynum, the failure to grant a severance was not deemed reversible error because of the "meticulous" charge which "summarized the Government's evidence as to each defendant and the evidence, if any, of each defendant who presented testimony," a charge which "alone [took] up eighteen pages of the record." Bynum, Id. at p. 497.

⁷⁵Kelly reiterated the requirement of instructions which constituted an "impregnable barrier" against the use of "testimonial-documentary evidence" admissible only as against particular defendants, to the prejudice of another defendant. Kelly, Id. at p. 748, citing United States v. Cianchetti, 315 F.2d 584, 589-91 (2d Cir., 1963); United States v. Aviles, 274 F.2d 179, 193, n. 4 (2d Cir., 1960), cert. den. sub nom. Evola v. United States, 362 U.S. 974 (1961).

⁷⁶Conducted with Graifer, not Vincent Aloi.

and Sebastian's statements to Graifer in English justify the inference and a jury conclusion that the use of the telephone wire was in connection with, in furtherance of and thus, in execution of, the conspiracy.

(Op. p. 6081)

The Court thus ignored the government's complete failure to prove an essential element of the crime -- the content of the call. It is only after the content is proven that the jury may infer whether the call was "in execution of" a scheme to defraud. Osborne v. United States, 371 F.2d 913, 927-29 (9th Cir., 1967).⁷⁷ Accord, United States v. Marino, 421 F.2d 640 (2d Cir., 1970).

The failure to consider this argument and to apply the governing case law requires rehearing and reversal on count 9.

VIII.

CONSPIRACY AND SUFFICIENCY OF EVIDENCE; DUE PROCESS IN APPELLATE REVIEW

In a normal appeal⁷⁸ the case, appellant's brief their claimed points of error, including the insufficiency of evidence on particular counts, and

⁷⁷In that case, the government also proved that certain calls occurred, and the subsequent results, but could not prove the content. The Court wrote: "We can pretty well surmise [the calls] content, but we cannot convict defendant [on the wire fraud count] on surmise." Id. at p. 928.

the government replies with evidence and record citations which it believes support the conviction. Thereafter, appellants have the right to rebut, explain or distinguish the evidence relied upon by the government, and finally, the court reviews all of this adversary proceeding and makes its determination. That did not happen in the instant case.

The government's brief was so factually inadequate and lacking in record citations that appellants moved to strike its statement of facts or for compliance with the rules of this Court requiring such substantiation. In its opinion, the Court agreed as to the government brief's inadequacy.⁷⁸

The result of this, however, was that following oral argument and submission of reply briefs, the court apparently engaged in "a detailed analysis of the entire record" (Op. p. 6065). On the basis of its essentially ex parte consideration of the record, it finds "facts" and makes inferences which, a priori cannot be rebutted or explain by counsel.⁷⁹

⁷⁸"The reviewing problem has not been rendered easier of solution by the government's brief. Its hyperbole in description is in many instances unsupported by the record or by any record references justifying its statements." Op. at p. 6065.

⁷⁹Like the Government, it generally fails to give citations or record references for such "facts."

In the circumstances of this case,⁸⁰ the procedure dangerously approaches a denial of due process.

In summarizing the "evidence"⁸¹ to deny Alois strong claim of insufficiency on the conspiracy count (Alois Br. pp. 8-16), the Court falls guilty of the same errors with which it charges the government. For facts it substitutes conclusions that Alois "must have known" and "must have communicated." This is inadequate to sustain a conviction.

Further, even under its own summary of facts, it never shows more than Alois knowledge of criminal activity,⁸² and some tenuous non-monetary profit therefrom.⁸³ Both of these are similarly attributed as to the appellant Savino⁸⁴ whose conviction was reversed.⁸⁵

⁸⁰We recognize that appellate courts have wide latitude in reviewing any record before them. This case, however, presents a somewhat special situation. Each of four appellate counsel read the record through several times, and each reading produced new information or a context in which previously read "facts" changed their color. The aggregate time spent in such reading (to the exclusion of all other work) approached eight months. No court, no matter how conscientious, could in a single reading comprehend all the intricacies of this record. It is precisely for this reason that the ability to reply, to point out facts the court may have missed, or to place facts in context, was of crucial importance.

⁸¹Op. at pp. 6073-74.

⁸²Insufficient under United States v. Gallishaw, 428 F.2d 760 (2d Cir., 1970).

⁸³Insufficient under United States v. Falcone, 109 F.2d 579 (2d Cir.), aff'd, 311 U.S. 205 (1940).

⁸⁴Who, unlike Alois, actually received Ten Thousand Dollars (\$10,000) in profit from the fraud.

⁸⁵The Court characterizes, "with restraint" as a non sequitur, the government's argument that Savino "knew or must have known that Hellerman's stock fraud deal was a fraud," although this is precisely its argument as to Alois (Op. at p. 6077).

There is no indication whatsoever of the essential requirement, i.e., that

... the Government establish[ed] beyond a reasonable doubt that the defendant had the specific intent to violate the substantive statute.

(United States v. Cangiano,
491 F.2d 906, 909 [2d Cir.,
1974])

Lacking any such finding -- or evidence to support it -- the conviction must be reversed.

IX.

INCORPORATION

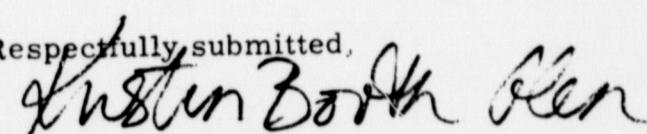
Pursuant to Rule 28(i) of the Federal Rules of Appellate Procedure, appellant hereby incorporates by reference all arguments made in appellant Ralph Lombardo's Petition for Rehearing and Rehearing En Banc.

CONCLUSION

FOR ALL OF THE ABOVE REASONS,
REHEARING AND REHEARING EN
BANC SHOULD BE GRANTED, AND
THE CONVICTION SHOULD BE RE-
VERSED.

Dated: New York, New York
February 28, 1975

Respectfully submitted,


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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 1144, 1150—September Term, 1973.
1159, 1171

(Argued June 24, 1974 Decided January 31, 1975.)

Docket Nos. 74-1220, 74-1278
74-1614, 74-1727

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—against—

VINCENT ALOI, JOHN DIOGUARDI,
RALPH LOMBARDO and JOHN SAVINO,

Defendants-Appellants.

Before:

MOORE and FEINBERG, *Circuit Judges*, and
PALMIERI,* *District Judge*.

Appeal by appellants from judgments of conviction of conspiracy to violate certain securities laws (all appellants), of use of a false and misleading offering circular (all appellants), and of wire fraud (Appellants Aloi, Dioguardi and Lombardo) entered after a jury trial in the United States District Court for the Southern District of New York, Hon. Whitman Knapp, *Judge*.

* Of the Southern District of New York, sitting by designation.

Affirmed as to Appellants Aloi, Dioguardi, and Lombardo and reversed as to Appellant Savino.

KRISTEN BOOTH GLEN, New York, N.Y. (Michael Ratner, of Counsel), *for Appellant Aloi.*

GRETCHEN WHITE OBERMAN, New York, N.Y. (Jay Goldberg, of Counsel), *for Appellant Dioguardi.*

JOEL A. BRENNER, Mineola, N.Y. (Gustave H. Newman, New York, N.Y., of Counsel), *for Appellant Lombardo.*

GERALD L. SHARGEL, New York, N.Y. (La Rossa, Shargel & Fischetti, of Counsel), *for Appellant Savino.*

BANCROFT LITTLEFIELD, Jr., Assistant United States Attorney (Paul J. Curran, United States Attorney for the Southern District of New York, Alan R. Kaufman, T. Gorman Reilly, Peter I. Truebner, Daniel Beller, S. Andrew Schaffer, Assistant United States Attorneys, of Counsel), *for Appellee.*

MOORE, *Circuit Judge:*

Vincent Aloi, John Dioguardi, Ralph Lombardo and John J. Savino were convicted under Count 1 of conspiracy to violate federal securities laws. 15 U.S.C. §§ 77q(a), 77s(a), 77x, 17 C.F.R. §§ 230.256 and 240.10b-5, 18 U.S.C. §§ 371, 372. All four were also convicted under Count 18 of use of a false and misleading offering circular. Aloi (Count 10), and Dioguardi and Lombardo (Count 9) were convicted of wire fraud. All defendants appeal. For the

reasons hereinafter stated, we affirm the convictions of Aloi, Dioguardi and Lombardo and reverse the convictions of Savino.

The various appellants raise so many points of alleged reversible error, the separate points of each being incorporated by reference by the others, that some initial general analysis and sifting of the facts must be made.

The main charge, Count 1, alleges a conspiracy, the object of which was unlawfully, wilfully and knowingly to offer and to sell to the public common stock of a company, At-Your-Service Leasing Corp. (AYSL), which was in a weak financial condition and consistently operated at a loss. The original purpose of the financing was to raise money for AYSL to enable it to pay off loans on which certain of the defendants who owned AYSL were personally obligated and to raise additional funds to carry on the business.

A conspiracy of this nature resembles a mosaic or a jig-saw puzzle. The picture consists of a myriad of individual pieces which when placed together reveal the ultimate image. Many artisans are frequently required, each contributing his segment. Despite the number of separate participants, it is one picture. And so here. An effort will be made sketchily to portray the part each appellant-conspirator and certain co-conspirators played.

At all relevant times, AYSL was an automobile leasing corporation doing business in West New York, New Jersey. Its owners and managers were defendants Sanford L. Price, Arthur Ferdinand, Murray A. Handler, J. Jack Ganek, and Edmund Graifer.¹ Defendants Andrew Nelson² and Gerald Miller³ conducted business as Tech-Ec Systems

¹ Price, Ferdinand, Handler and Ganek were also certified public accountants. They were indicted but their trial was severed.

² Nelson was indicted and pleaded guilty.

³ Miller pleaded guilty.

(financial consultants). Miller was also an attorney.

In and subsequent to July 1969, Nelson, a financial consultant (Tech-Ec) agreed with the principals of AYSL to arrange an AYSL stock issue for a \$20,000 fee. The issue was to be an unregistered exempt (Regulation A) issue of 100,000 shares at \$3 a share, 50,000 shares of which had to be sold within 90 days of the SEC effective date, April 8, 1970, or the subscribed money refunded.

An offering circular was prepared by Nelson and Miller dated as of April 8, 1970. Apparently a broker-dealer, TDA Securities, Inc., whose principals were defendants Gilbert C. Dragani, Donald Fisher and Louis Nova,⁴ was ostensibly supposed to be the underwriter. The offering circular was most explicit. In bold type on the first page it stated: "THESE SHARES INVOLVE A HIGH DEGREE OF RISK." Under "Risk Factors to be Considered," were listed seventeen factors, any one of which should have deterred a prospective purchaser from buying the stock. And until the conspiracy commenced, no one did.

To summarize briefly, at this point there was an offering circular under which \$300,000, less proper expenses, could potentially be obtained from the public. Graifer's and AYSL's financial conditions were such that they needed money by fair means or foul. Fair means having failed, they chose to investigate the possibilities of the other alternative.

There being no AYSL stock sales, Graifer as an owner and manager was called upon by his associates to remedy the situation. From this point on, the pieces of the mosaic began to be filled in rapidly. Graifer had a friend, Ralph Lombardo, and another friend in Florida, Sebastian Aloi,⁵

4 Dragani, Fisher and Nova were indicted and pleaded guilty.

5 Sebastian Aloi, originally indicted, was severed for health reasons prior to trial.

father of Vincent Alois.⁶ Graifer and Lombardo went to Florida to consult with Sebastian. Sebastian instructed Lombardo to get in touch with a Michael Hellerman, a well-known stock swindler, to see if he could put the sale across. Hellerman was associated with defendant John Dioguardi, who owned a percentage of Hellerman's profits.

Thereafter, Lombardo, to whom Hellerman owed \$10,000 on a loan, approached Hellerman, who agreed, after seeing the offering circular, to sell 50,000 shares provided he received a secret kickback of \$45,000, "under the table", half of which, he said, had to be paid immediately in order to bribe brokers to tout the stock.

Lombardo and Hellerman then proceeded to Dioguardi's office to obtain Dioguardi's approval of Hellerman's participation therein, which was granted. Lombardo, Hellerman and Dioguardi then telephoned Sebastian in Florida and informed him of the terms. Thus, there was a guarantee by Sebastian of Graifer's performance and by Dioguardi of Hellerman's.

About the middle of June, because Graifer was unable or unwilling to pay the required \$22,500, Lombardo produced and delivered \$22,500 (half of the \$45,000) to Dioguardi's office.⁷ By July 7th, the expiry date for the sale of the 50,000 shares, Hellerman, despite his previous successes, had failed to cause the stock to be sold. Accordingly, Dioguardi returned the \$22,500 to Lombardo.

Somewhat collateral to the stock sale but definitely related thereto was an incident which brought three additional defendants into the picture, Pasquale Fusco,⁸ John

6 Because of the two Alois, first names will be used to identify them.

7 Details of delivery of \$22,500 to a defendant Ira Schultz in an abortive attempt to induce him to try to sell the stock and the return of \$22,000 thereof are omitted.

8 Fusco became ill during the trial and was severed.

Savino and Vincent Alois, Sebastian's son. Hellerman in a previous unsuccessful stock deal had lost \$10,000 belonging to Fusco and Savino. They were apparently without power to obtain its return without the aid of Dioguardi. Fusco and Savino were friends of Vincent and through an Alois-Dioguardi arrangement, Hellerman was to pay the \$10,000 when financially able to do it. When Fusco and Savino learned that Hellerman was going to receive \$45,000 without making any provision to pay them, Fusco said that he would see Vincent to obtain his aid in getting their money back. This development temporarily halted any efforts to sell AYSL stock but Graifer, who was most seriously affected by the stoppage, again went to Florida, saw Sebastian and explained the difficulty. Sebastian told him not to worry, telephoned his son, Vincent, and although he spoke to Vincent in Italian, immediately thereafter told Graifer in English that everything would be straightened out and that Hellerman and the stock deal would be reinstated. Hellerman was informed by Dioguardi that he could continue with his scheme but that Vincent had specified some variation in the former terms. Out of Hellerman's \$45,000, Fusco and Savino were to receive \$10,000, Hellerman was to repay Lombardo the \$10,000 loan and Dioguardi was to receive the \$25,000 balance.

Despite the passing of July 7th, the expiry date for the legal sale of the stock, money came in from sales effected by Hellerman and his henchmen, namely, brokers engaged by him.

On July 28, 1970, some three weeks after the legal expiry date, a purported "closing" under Hellerman's supervision took place. Present were Lombardo, Hellerman, Graifer, Ferdinand (a principal of AYSL), Nelson and Winter (Hellerman's attorney). Hellerman produced \$150,000 in checks (50,000 shares at \$3 a share), some bogus and some

not honored. Hellerman arranged to have TDA backdate its records to July 7th to give an appearance of legality. Subsequently these checks to the extent of \$127,500 became good.

In August 1970 Graifer, from the proceeds, delivered the \$45,000 to Lombardo. Lombardo passed it on to Dioguardi. Dioguardi then gave \$20,000 of this sum to Vincent who then distributed \$10,000 to Fusco and Savino and \$10,000 to Lombardo. The remaining \$25,000 Dioguardi used to repay that amount on an indebtedness owed by him and Hellerman. This manner of this distribution was thereafter confirmed, each to the other, including Graifer.

Concerning activities after these events, it is sufficient to say that Hellerman, consistent with his reputed skill in this sort of activity, then conducted a series of spurious manipulations in the AYSL stock and reported them at least to Graifer and Lombardo.

Again to summarize, what had started as an effort to raise money for AYSL had been taken over by Hellerman, Lombardo, Vincent Alois and Dioguardi as a scheme to obtain money from the public via the sale of AYSL stock for their own use and purpose without disclosure of this fact to the purchasers.

Before embarking on a more detailed analysis of the many points raised by appellants' counsel, some comment upon the trial must be made based upon an appellate perspective as obtained from the record. The trial lasted for over eight weeks. The transcript was almost 6000 pages, of which hundreds of pages were devoted to colloquy between court and counsel. The four appellants were represented by experienced defense lawyers whose seizure of every opportunity technical and otherwise on behalf of their clients in aid of their defense bespeaks the adequacy

of their representation. Scores of motions for a mistrial are sprinkled throughout the record.

Fundamentally the case resolved itself into a question of witness credibility. The government's principal witnesses were Graifer and Hellerman. Their criminal records were well known. Following usual trial strategy technique, the government on its direct examination brought out much of their past records hoping to ameliorate, and soften if possible, the attack on cross-examination. Defense counsel thereafter devoted a high percentage of their time in establishing that these two witnesses, particularly Hellerman, had committed many crimes, in Hellerman's case stock swindles, check forgeries, tax evasion, frequent perjury, even ordinary stealing. Graifer, too, was "Graifer, the thief, the self-confessed perjurer." (Tr. 5066).

The government in turn introduced an agreement it had made with Hellerman under which he purportedly committed himself to tell the truth in exchange for many leniencies and financial benefits—of which more later.

Defense counsels' conception of the issues on the trial is best obtained from their own summations. To one defense counsel there was "no question of the fact that Mr. Hellerman and his cohorts perpetrated a swindle upon the public and cheated innocent victims." (Tr. 5066). To another there was "no dispute that there were criminal acts committed in connection with the stock fraud of At-Your-Service Leasing." (Tr. 5184). And all, during trial and summation, devoted a large portion of their efforts to demonstrating that Graifer and Hellerman were completely unworthy of belief. Belief or disbelief, being solely a jury function, the only law question is: was the jury given proper instructions for its determination? Factually, were appellants so tied into Hellerman's swindle as to constitute a conspiracy?

Corollary to the main issue of conspiracy are the questions of the conduct of the prosecution in establishing it and the sufficiency of the trial court's charge in outlining the factual issues to be determined by the jury.

The reviewing problem has not been rendered easier of solution by the government's brief. With little supporting proof the government assumes two groups, the Alois and the Dioguardi, reminiscent of the Montagues and the Capulets, each group being charged with having entered into an agreement with the other to perpetrate the sale of worthless AYSL stock to the public (Govt. Br. p. 5). Its hyperbole in description is in many instances unsupported by the record or by any record references justifying its statements.

For this reason and because of the many appellate points raised by appellants' counsel, a detailed analysis of the entire record has been required. In so doing, it must be remembered that every departure from normal courtroom procedure does not constitute reversible error. And trial strategy should be left in the hands of counsel, who in this case ranked amongst the ablest of the criminal defense bar.

Probably no criminal charge is more difficult of definition than conspiracy. In short, there must be a conspiracy to commit a crime. Conspiracy itself has been defined as an agreement or a concert of action. Individuals, about to commit a crime, however, do not sit down and draft their agreement with the meticulousness of a corporate mortgage. Therefore, the conspiracy must most frequently be upon the facts and words of the alleged conspirators or the inferences drawn therefrom.

The conspiracy charged is that the defendants "did combine, conspire, confederate and agree together and with each other to commit certain violations of federal law, to wit, violations of Title 15, United States Code, Sections

77q(a), 77s(a), 77x and 17 C.F.R. §§ 230.256 and 240.10b-5." As "Objects of the Conspiracy", the indictment in substance alleged that as a part of the conspiracy the defendants would offer AYSL stock for sale, by means of communication in interstate commerce, employ schemes to defraud, obtain money by means of untrue statements and omissions of material facts and engage in practices which would operate as a fraud and deceit upon the purchasers of AYSL stock in violation of 15 U.S.C. § 77q(a). Also as parts of the conspiracy were alleged the use of a false and misleading offering circular (15 U.S.C. § 77s(a) and Rule 256(e), 17 C.F.R. § 230.256(e) and Form 1A, Schedule I), and the employment of manipulative devices in connection with the purchase and sale of AYSL stock (Rule 10b-5, 17 C.F.R. § 240.10b-5).

As "Means of the Conspiracy," the facts by which the defendants and co-conspirators would and did carry out the conspiracy and which are to some extent outlined herein, were set forth in the greatest detail.

We turn now to the principal errors asserted by the individual appellants.

Lombardo:

Lombardo challenges the sufficiency of the evidence to establish that he was a knowing member of a conspiracy to violate the securities laws of the United States.

A conspiracy to be criminal must, of necessity, encompass a crime. As the trial court charged, the jury could find a defendant guilty of conspiracy or aiding and abetting only if it were established that he knew of the unlawful purpose of the conspiracy. There is more than sufficient proof in the record from which a jury could have found or inferred the following facts with respect to Lombardo.

Graifer and Lombardo were friends. When the desired sales of AYSL stock were apparently not capable of being made, Graifer turned to Lombardo for help. Lombardo

knew of the hopeless financial condition of the company because Graifer had given him an offering circular disclosing it. Together they went to Florida to seek Sebastian's suggestions. Sebastian suggested Hellerman, who was represented as being "with" or in partnership with Dioguardi, and said that if Hellerman could do the deal Sebastian would contact Dioguardi. Upon their return to New York a meeting with Hellerman was arranged at which the offering circular was shown to Hellerman. Hellerman then regaled Lombardo and Graifer with his other stock swindles. Hellerman indicated that he could do the deal if Dioguardi approved but demanded \$45,000 "under the table" for himself. He claimed that he needed 50% of this amount in advance ("up front") to bribe brokers to tout the stock. Lombardo also demanded from Graifer to be put on the AYSL payroll at \$200 a week and free use of AYSL cars and credit cards.

Lombardo and Hellerman then proceeded to Dioguardi's office where, after a further discussion with three, Lombardo, Dioguardi and Hellerman, by telephone told Sebastian in Florida of their agreement.

It was Lombardo who delivered the \$22,500 to Dioguardi, who in turn told Hellerman and Kelsey to give it to Schultz who was going to try to sell the stock. Schultz had no success and the money was returned, Lombardo being present at the time. Hellerman then told Lombardo that he could do the deal without the advance money.

A new deal was arranged for the distribution of the \$45,000 which Vincent approved and which was known to Lombardo whereby Fusco and Savino were to receive \$10,000, Lombardo \$10,000 and Dioguardi \$25,000, which Dioguardi applied on account of a debt.

At the purported closing held on July 28, 1970, at which funds represented by Hellerman as obtained from the sale

of the stock in the amount of \$127,500 were displayed, Lombardo was present.

Lombardo thus occupied a key role in Hellerman's swindle from the initial meeting down to the closing. He participated in most of the meetings with Dioguardi to promote the swindle and had a definite monetary stake therein, including his \$200 a week from AYSL and other emoluments plus his \$10,000, paid out of the \$45,000. And Lombardo's telephone call to Sebastian was both in furtherance and in execution of the scheme in that Sebastian had to approve or confirm the deal. We conclude therefore that there was ample evidence to support Lombardo's conviction under Count 1.

Lombardo claims that Hellerman's testimony of a \$10,000 loan by Lombardo to Hellerman at a highly usurious rate of interest was so prejudicial as to deprive him of a fair trial. A count (count 38) based upon this loan had been severed and Lombardo contends that no reference should have been made to it.

There is no question but that Lombardo received repayment in the amount of \$10,000 out of the proceeds of Hellerman's swindle. To this extent testimony concerning the loan was admissible. Furthermore, its existence could have justified an inference that it might have been an influencing factor in Lombardo's participation in the conspiracy.

To refute the denial by Lombardo of the Hellerman loan the government introduced evidence of many other loans made by Lombardo to others. These loans were alleged to appear on certain lists in Lombardo's handwriting. Admission of these lists for cross-examination purposes may have been proper as an attack on credibility. Whether the government intended this restrictive purpose or introduced the lists to prove Lombardo a loanshark

is debatable. However, the court in its charge endeavored to confine the admission to a credibility issue.

Lombardo charges that the government sought to degrade him in the eyes of the jury by revealing his extramarital relationship with a young lady. However, this testimony was properly adduced in light of his presentation of himself as a family man.

Lombardo also claims that information obtained from his testimony given before a State Grand Jury in Nassau County as to which he was given immunity formed the basis for much of his cross-examination and that the use of these "Immunized Transactions" (Lombardo, Br. 49) deprived him of a fair trial. If, however, the information revealed was either already known or came from independent sources, this argument fails. The trial court investigated the facts in an evidentiary hearing and concluded that the prosecution had not made use of such testimony. There is no basis for holding the court's ruling to have been clearly erroneous.

Dioguardi:

All the appellants, particularly as stressed in Dioguardi's brief, attack the court's charge, claiming that it was inaccurate, inadequate, and insufficient. Because the jury's duty is to weigh the facts in light of the court's instructions as to the law, attention must be turned initially to the charge itself.

The court quite accurately, though briefly, outlined "the basic criminal enterprise that the government claims to have established." (Tr. 5487-5488). It started with Graifer's AYSL financial problems, continued through his "more or less legitimate means" to unload the corporation on the public, Graifer's subsequent meetings with Sebastian, Lombardo, Hellerman and Dioguardi, their placing the stock scheme in the hands of Hellerman

and the accomplishment of the conspiracy by the unloading of the stock. In addition, the court gave a brief sketch of the respective roles which the government contended each defendant occupied, Dioguardi authorizing Hellerman to proceed and supervising his conduct, Vincent entering the conspiracy to take care of the Fusco-Savino claim against Hellerman, Savino to have his claim satisfied, and Lombardo, the original negotiator to "more or less run herd on the operation."

The jury was told briefly but adequately that the crime of conspiracy is "substantially as follows":

If two or more persons, any two, conspire to commit any offense against the United States and one or more of such persons does any act to effect the object of the conspiracy, each shall be guilty of a crime. (Tr. 5490-91).

Three elements were stated: (1) conspiracy; (2) an object —namely, commission of an offense against the United States; and (3) an act to effect the unlawful objective. The court then proceeded by asking "What is a conspiracy" and answered the question by saying "A conspiracy in ordinary layman's language is no more or less than a common understanding entered into between two or more persons to achieve an unlawful objective." (Tr. 5490).

A "vice" of the court's charge, according to Dioguardi, lies in these words:

"... I advise you as a matter of law that the objectives of this conspiracy as described by the government, namely, obtaining moneys from the public by fraudulently pumping worthless securities into the ordinary channels of commerce could not be accomplished without violating the above-mentioned statutes and you would be entitled to conclude that any de-

fendant whom you find to have intended such objectives, must have contemplated the violation of those statutes." (Tr. 5492).

This was followed with the admonition that if a conspiracy were found that "all of them become guilty of any criminal act performed in the furtherance of that conspiracy, whether or not any of them individually had anything to do with that particular unlawful act or even knew of its existence." (Tr. 5494).

This charge, argues Dioguardi, in effect constitutes an amendment of the indictment in that the jury could have found Dioguardi guilty if "he [Dioguardi] associated himself with Hellerman in an on-going scheme, beginning in 1969, to obtain money from the public in fraudulent security transactions, even though the grand jury did not frame the conspiracy count in this fashion." (Dioguardi Br. 33).

This argument is tied in with, and dependent upon, his claim of error in the admission of proof that beginning in 1969 Dioguardi had 25% (raised to 50% in the *Belmont* [a previous Hellerman stock swindle] stock fraud) of everything Hellerman did and of proof to a limited extent of the *Belmont* deal. Dioguardi's claim that the injection of Hellerman's *Imperial* and *Belmont* frauds into the case thereby allegedly forced him to defend himself in three separate trials is not well founded. None of the issues in those cases was before the jury here. And despite protracted colloquy between court and counsel as to whether the outcome of those cases should be presented to the jury, it was not.

The trial court's charge, according to Dioguardi, did not accurately define the offenses (Counts 1 and 18) and their respective elements. His criticism is that the court did not read the applicable statutes to the jury but merely stated

that if they found certain facts then the crime charged had been committed as a matter of law, citing *Morris v. United States*, 156 F.2d 525 (9th Cir. 1946), and *United States v. Levy*, 153 F.2d 995 (3rd Cir. 1946). In particular, Dioguardi claims that the court should have defined the terms "fraudulent", "material" and "undisclosed underwriter" and should have been charged that any material omissions from the offering circular had to be willful.

Criticism is also levelled at the brevity of the court's charge. This was a long trial; the jury had heard and seen many witnesses. At the conclusion of the trial they must have had a fairly good idea as to the issues. The summations of the four counsel for the four defendants and the government highlighted the salient contentions. The value to a jury of a four or five hour charge will undoubtedly be a subject for judicial debate for years to come. The so-called "boiler plate" section of the charge has been built up over the generations to a highly disproportionate size by adding the omissions held to have been error by appellate courts in their decisions over the years. An attempt at brevity is now characterized as "plain error"—a term of art tantamount to saying that a defendant has not had a fair trial.

If error is "plain" one might well ask: plain to whom? Apparently not to the experienced defense counsel during the trial. These counsel were given by the court a copy of its charge in another similar case and advised by the court that it proposed to give a somewhat similar charge as to the substantive counts. Rule 30, F.R.Cr.P. must be given some meaning. Its purpose is obvious, namely, to give the trial judge an opportunity to remedy any defects which counsel believe may exist.

Dioguardi claims error as to him in the introduction of an alleged partnership agreement with Hellerman whereby

he was entitled to a certain percentage of Hellerman's profits obtained through his swindles. Such proof did not constitute a variance from the indictment or introduce prejudicial evidence of other unrelated crimes. The relationship with Hellerman and Dioguardi had to be developed to show Dioguardi's place in the AYSL stock fraud. Witness: Graifer's question to Sebastian when Hellerman's name was mentioned as to how and why Dioguardi was involved. (Tr. 477). The evidence, as well outlined in Dioguardi's brief, discloses a close relationship to the AYSL swindle from the initial time when Hellerman said he had to consult Dioguardi before he could proceed with the deal through the various meetings at his office, his various telephone calls to Sebastian and his interest in keeping his hands on the pursestrings of \$45,000 of the proceeds.

Aloi:

Aloi (Vincent) would have his participation limited to an effort to help his friends, Fusco and Savino, obtain payment of the alleged indebtedness of Hellerman to them. However, the proof and the reasonable inferences therefrom lend themselves to factual conclusions quite beyond any such restricted purpose and activity. When Vincent was informed that Fusco and Savino had not been provided for out of Hellerman's \$45,000, he must have known the details as to its proposed source and must have communicated with Lombardo on the subject. He was a definite participant through orders to Lombardo to obtain the return of the \$22,500 (half of the \$45,000) given to Hellerman.

The telephone call from Sebastian in Florida to Vincent in Suffern, N.Y. is not without significance, and from the consequences thereof the jury would have been justified in believing that the subject matter of the conversation was not limited to the merits of Florida weather. Graifer had

gone to Florida to complain about the interruption of the stock deal purportedly by Fusco and Savino. Sebastian, although speaking in Italian to Vincent, at the conclusion of the call said in English "everything will be straightened out"—and indeed it was. Hellerman was reinstated but the terms of the \$45,000 payment were altered. The terms (there was testimony that Dioguardi told Hellerman that he could proceed on new terms set by Vincent) called for a distribution at the end of the deal by Vincent and Dioguardi who would pay \$10,000 to Fusco and Savino; and \$10,000 to Lombardo. The remaining \$25,000 Dioguardi used in payment of an unrelated indebtedness.

Vincent was obviously interested in the outcome of the stock sale ("He just wanted to know what was going on." Tr. 1860) He knew that the stock issue was to be the source of the money with which the conspirators were dealing and when he heard that Hellerman had actually sold more than 50,000 shares of AYSL stock said that he would take the matter up with Dioguardi. Vincent's argument that the proof shows (at the "very worst") only that he "knew that some kind of stock swindle was going on," ignores the many facts establishing that he participated in keeping the swindle going and that through his hands passed much of the proceeds thereof.

At the July 28, 1970 closing Lombardo was there "to report back to Vinny (Aloi) how everything was going." At the closing Hellerman was told by Lombardo to get in touch with Dioguardi and that Vincent and Dioguardi would "straighten out the money" (Tr. 1864). When the money became available Graifer received \$45,000 which he delivered to Lombardo, who in turn delivered it to Vincent for the distribution above described. Each of the beneficiaries on various occasions thereafter acknowledged their benefactions to one or more of the other defendants.

Conversations concerning the stock deal between Vincent, Lombardo and Graifer continued through 1970 and into early 1971.

Vincent's present contention that there were multiple conspiracies and that his only participation in the events related to an endeavor to retrieve \$10,000 for his friends is belied by the evidence.

Vincent claims that he was unconstitutionally prevented from taking the stand because the trial judge had ruled in advance that a state court perjury conviction (then on appeal) could be used to impeach him. (Whether he would have taken the stand is conjectural. No offer of proof was submitted by his counsel.)

Apparently the circuits are in conflict on the impeachment use of a non-final (namely, still on appeal) conviction. This circuit has recently considered the question in *United States v. Soles*, 482 F.2d 105 (2d. Cir.), *cert. denied*, 414 U.S. 1027 (1973) in which Judge Friendly analyzed the merits of the conflicting views. In both *Soles* and this case the previous conviction was closely related to credibility (in *Soles*, bribery; here perjury). We, therefore, continue to adhere to the rule that the trial judge has discretion to allow the use for impeachment purposes of a conviction under appeal and for the reasons stated in *Soles*.

Vincent also claims that the indictment was unlawfully amended by the addition of some twenty alleged co-conspirators on the eve of the trial. Such a practice is not to be commended but on appellate review the question is: how were the defendants prejudiced thereby? Of the added co-conspirators only Shustek's conversations bore upon the issues, and these were merely cumulative.

Savino:

No facts whatsoever were presented by the government sufficient to establish that Savino was a member of the conspiracy alleged in the indictment. The far-fetched and unjustifiable inferences sought to be drawn by the government in an effort to tie him into the conspiracy attest to the lack of any foundation upon which to rest his conviction. The facts surrounding Savino's involvement are clear.

Prior to the conception of the AYSL stock offering and as a result of a \$10,000 loss sustained by Savino and Fusco on stock of a previous Hellerman venture (Trimatic), Hellerman had agreed to repay this amount to them when financially able to do so. There is no basis for the government's inference that Savino must have known that Trimatic was a Hellerman swindle nor was there any proof that it was. Whatever may be the reasons for Hellerman's admission of this obligation, they are irrelevant to the conspiracy here charged.

When Savino and Fusco fortuitously learned that Hellerman might be in funds (the \$45,000 from the AYSL deal) they were naturally desirous of receiving the \$10,000 repayment promised when Hellerman's financial condition permitted. Their knowledge of how best to apply pressure is evidenced by their turning to Vincent for his help in obtaining repayment. And it may very well be that Vincent insisted as a condition of Hellerman's proceeding with his planned stock swindle that Fusco and Savino be paid Hellerman's indebtedness to them.

To obtain a commitment for payment from Hellerman, Vincent may have temporarily stopped the AYSL deal, but this act did not inject Savino into the conspiracy. The government makes a wholly unjustified assumption that if Savino knew or suspected that Hellerman was engaging in another of his many stock swindles that fact automatically made Savino a conspiratorial participant therein. Nor

does the fact that the \$10,000 was paid to Savino and Fusco out of Hellerman's ill-gotten gains place him in such a category.

The government argues that Savino knew or must have known that Hellerman's AYSL stock deal was a fraud and that "he had access to the man who ultimately stopped it and started it again, Vincent Alois." (Gov't Br. 40). Only with restraint can this argument be characterized as a *non sequitur*.

In summary, there is no proof that Savino was a participant in any way in Hellerman's stock fraud set forth in the indictment and in the operations employed in its accomplishment. Whether he induced Vincent to aid him in the recovery of the Hellerman debt is no part of, or relevant to, Count 1 of the indictment.

Since Savino was never a member of the unlawful conspiracy alleged in Count 1, we must also reverse his conviction under the substantive Count 18. *United States v. Cantone*, 426 F.2d 902 (2d Cir.) *cert. denied*, 400 U.S. 827 (1970).

The Government-Hellerman Agreement:

Dioguardi and his co-appellants strongly attack an agreement made by the government with Hellerman to induce him to testify. As Dioguardi's counsel quite accurately states: "The extent of the consideration given to Michael Hellerman to induce him to testify was extraordinary." (Dio. Br. p. 55)—and indeed it was. He had swindled the public out of millions of dollars; he had failed to pay income taxes; he had promised as a condition of leniency to refrain from further criminal activities, which promise he broke. Even when pretending to be in the government camp he was surreptitiously engaging in further swindles, brazenly admitting that "I thought I could get

away with giving information to the government and making money on the side." (Tr. 2377).

But the government was apparently willing to forego further prosecutions and collections of large amounts of income tax to secure his testimony.

Counsel for Dioguardi argues that "any witness who takes the stand is obligated, by virtue of the oath he takes, to testify truthfully," and that as a result "no special agreement with him was necessary to secure truthful testimony." Therefore, he contends that it was highly improper for the government to argue in summation that the government's agreement with Hellerman put the imprimatur of truth upon his testimony. The government even sought to reinforce Hellerman's questionable credibility by disclosing its threat, under the terms of the agreement, to prosecute him for perjury if he testified falsely.

However, whether this incident deprived appellants of a fair trial must be considered in light of all the circumstances. The jury had seen and heard Graifer and Hellerman. They had heard appellants' counsel day after day blast their capacity for veracity. The agreement was merely one of many items to bear upon the question. It is to be doubted that an agreement could override the effect of the many unconscionable crimes which counsel paraded before the jury as perpetrated by these witnesses. Furthermore, the question of credibility was properly presented to the jury by the court.

Joint Trial With Dioguardi:

Vincent and Lombardo claim denial of due process because of prejudice resulting from being tried with Dioguardi. This prejudice could have been avoided, they claim, by the granting of a severance. In short, these defendants assert that Dioguardi's reputation as an under-

world figure and the introduction during the trial of his extensive criminal record, his continuing arrangement with Hellerman, and his associations with various other notorious persons contaminated them because of trial joinder.

During the jury *voir dire*, which required three days, the trial court allowed the defense twenty peremptory challenges and the prosecution twelve. Vincent takes exception to the court's ruling that the peremptory challenges had to be exercised unanimously rather than by allotment of separate challenges. However, prior to the use of these challenges, many jurors had been excused for cause. A jury of twelve with six alternates was finally selected. But even thereafter the trial judge personally interviewed each juror and alternate as to prejudice. Quite naturally in any multi-defendant trial there will be differences in degree of guilt and possibly degree of notoriety of the defendants. There may be some likelihood that proof admitted as to one or more defendants will be harmful to the others. However, this possibility does not necessarily justify individual trials. Faced with this situation the trial judge took every feasible step to obtain an unbiased jury.

During the trial Dioguardi and Lombardo elected to take the stand. Under such circumstances the government was entitled to inquire into their past criminal activities. Vincent, despite his protestation that "[he] and Savino played minor if not negligible roles" (Aloi Br. p. 47), took an important part in the conspiracy, particularly in the disposition of the proceeds of the fraud.

Finally as to prejudice resulting from the joint trial Vincent asserts that the charge "was totally inadequate to deal with any, let alone all, of the prejudicial testimony allowed into the trial." (Aloi Br. p. 53). Of course the trial judge could have consumed hours in analyzing every

bit of evidence which applied only to a particular defendant, but the conclusion would not have been different from the charge as given, namely, "evidence offered or admitted only (sic) one defendant should not be considered in connection with your determination of the guilt or innocence of any other defendant." (Tr. 5479).

Considering the nature of the case and the roles which each defendant played, severance was properly denied.

The Wire Fraud Counts:

Lombardo and Dioguardi attack their convictions under Count 9 on the ground that the telephone call to Sebastian was not made for the purpose of "executing" (18 U.S.C. § 1343) the stock swindle scheme but at most was "for the purpose of concocting a conspiracy" or "for the purpose of formulating a conspiracy to defraud", purposes allegedly not proscribed by the statute. There was adequate proof to rebut any assumption that the conspiracy was created or concocted in this telephone call. To the contrary the scheme had been formulated and was already in existence. Sebastian's approval, to the conspirators at least, was a required part of the scheme. The call was definitely in furtherance of the conspiracy.

Vincent's conviction under Count 10 was based upon the telephone conversation with Sebastian in June 1970. Vincent claims that the judge's charge was reversibly erroneous because he charged that any defendant "already found guilty of conspiracy" could be found guilty if the call were made "in furtherance of the unlawful scheme to defraud alleged in the indictment," (Vincent's Br. 37). This use of the words "in furtherance" instead of "in execution of" constitutes, so argues Vincent, a fatal variance. Such an argument is quite unrealistic. A single call concerning the scheme might well be an important ingredient thereof with-

out it being the complete execution thereof. In this instance, despite the Vincent-Sebastian conversation being in Italian, the purpose of Graifer's visit to Sebastian, his conversation in English as to the problems facing the stock scheme and Sebastian's statements to Graifer in English justify the inference and a jury conclusion that the use of the telephone wire was in connection with, in furtherance of and thus, in execution of, the conspiracy.

Count 18—Use of a False and Misleading Offering Circular:

The indictment alleged that the defendants "willfully used and caused to be used" a false offering circular. Vincent argues that there were no material misrepresentations in the offering circular and in any event that there was no "use" of any offering circular so far as he was concerned. He points to the fact that the circular had been filed with the SEC and become effective on April 8, 1970, and that he did not enter the conspiracy (a conspiracy is not conceded by him) until the June 1970 Florida telephone call from Sebastian. Therefore, Vincent concludes that he cannot be found guilty of committing the substantive crime (Count 18) which took place prior to his alleged entry therein. *United States v. Cantone, supra*, 426 F.2d at 904.

As to the argument that there was a variance between indictment and proof in that "the offering circular was never 'used' in any common sense of the term" (Aloi Br. 27), Vincent would restrict the word "use" to the delivery thereof to a purchaser or prospective purchaser prior to the sale. There is no sound basis for any such limitation. The proposed offering circular had to be filed with the SEC. On the basis of the representations therein the Reg. A exemption requested would or would not be granted. Once granted, no securities could be sold unless the cir-

cular were furnished to the prospective purchaser at least 48 hours prior to the mailing of the confirmation. To be sure, the offering circular was not used in the manner normally to be expected, namely, mailed to prospective purchasers before sale were consummated.⁹ But having been filed with the SEC, it was the genesis of the subsequent plan to defraud, and, facially at least, the existence of the filed circular lent an aura of legitimacy to the scheme.

Whether the offering circular contained any false or misleading statements or any material omissions at the time of its original filing need not be resolved because when the Hellerman plan was conceived and carried out, i.e., when the circular was "used" and after Vincent had joined the conspiracy, it certainly became false. 17 C.F.R. § 230.256(e) provides: "In no event shall an offering circular be used which is false or misleading in light of the circumstances then existing." The circumstances then existing bore no relationship whatever to the circumstances existing on April 8, 1970.

The subsequent Hellerman role had not been disclosed, the appropriation of \$45,000 to their own use by the con-

9 The government states in its Brief that "the offering circulars were 'used' as well, in other ways than being mailed to purchasers," and that "There was clear circumstantial evidence that the offering circulars were sent to purchasers of AYSL stock." The statements are followed by the declaration that "at the time Hellerman mailed the offering circulars to purchasers of the stock he knew that the circular was false . . ." (Gov't Br. 51). There is no proof in the record that Hellerman mailed or caused to be mailed an offering circular to any purchaser. Unable to supply proof or record references for these unfounded assertions, the government lamely retreats to the position that "it follows that the jury could have reasonably inferred that Hellerman sent (or gave) the offering circulars to his purchasers . . ." (Gov't Br. 52). However, even this unwarranted assumption is undercut by the actual proof that the circulars were delivered to Nelson, who did not mail them but delivered them to Hellerman, who in turn failed to mail them. Only certain confirmations were mailed and received by purchasers.

spirators was not revealed, and the "use of proceeds" representation had been rendered completely false. Hellerman and Lombardo knew, from having had the circular in their hands, that their planned nefarious scheme was not set forth therein. Dioguardi knew of the fraudulent selling scheme because Hellerman had told him of his plan.¹⁰

Dioguardi, Lombardo and Vincent put themselves in Hellerman's hands, as their agent, their co-conspirator or their abettor (terminology in this situation is not of the essence) to accomplish a fraud. The method used by Hellerman may have been of little interest to them, the beneficiaries, but they cannot claim to have been mere spectators watching the game from the sidelines. The proof shows that all three had their glasses trained upon the game which Hellerman was playing and that they were intensely observing, and interested in, every move.

The proof was more than adequate to justify the conclusion of a conspiracy. Nor can the conspirators escape responsibility for the acts of their co-conspirator. They chose to give Hellerman *carte blanche* to conceive, manage and carry out their fraud. Under the doctrine of *Pinkerton v. United States*, 328 U.S. 640 (1946), they are liable for substantive crimes committed in furtherance of the conspiracy.

That innocent people were injured by the defendants' stock swindle was a point little stressed at the trial. The prosecution was so obsessed by its two-family (Aloi-Dioguardi) hierarchical theory and its concentration of proof on the machinations relating to the division of the stock swindle proceeds, that the source of the funds to be realized from the swindle played a minor part in its

¹⁰ Hellerman explained that he would sell the AYSL stock, first by bribing brokers, and then by having buy and sell confirmations made up showing a two-point spread to convince people to buy on the basis that they had a sure profit in the stock. Tr. 1804-06.

presentation. However, we think the victims of the plan are worthy of mention. Five witnesses were produced who testified that at the behest of Hellerman's broker-salesmen they had purchased and paid for the worthless AYSL stock. They paid by checks, which were produced along with the confirmations they had received by mail. Since it may reasonably be assumed that none of the conspirators was coming to the rescue of AYSL out of their own pockets, it would be an equally reasonable inference that the \$127,500 came from illegal sales to innocent and defrauded purchasers.

The Sentences Imposed:

Vincent and Lombardo contend that their sentences were improperly imposed. Vincent was sentenced to five years on the conspiracy count (Count 1) plus a \$10,000 fine, to four years (consecutive) on the false circular count (Count 18) plus a \$5,000 fine, and a five-year suspended sentence plus a \$1,000 fine on the wire fraud count (Count 10)—a total of nine years and fine of \$16,000. Lombardo was sentenced to concurrent terms of five years on Counts 1 and 18 and a suspended five years on Count 9. He, too, was fined a total amount of \$16,000. These appellants claim that hearsay material contained in the probation report and in a special sentencing memorandum submitted by the government at the request of the trial judge may have caused the judge to sentence them for offenses other than those for which they were convicted.

This court recently considered the question of a government sentencing memorandum in *United States v. Rosner*, 485 F.2d 1213 (2d Cir., 1973), *cert. denied*, 417 U.S. 950 (1974). The factual situation was somewhat different there in that the government submitted the memorandum *ex parte* to the court which kept it for some two months. Only

on the day of sentencing was it disclosed. The court then denied a requested opportunity to study and rebut, if possible, the contents. Under the "unusual circumstances" (485 F.2d at 1231) of the *Rosner* case, this court remanded for sentencing before another judge. Here, however, the memorandum was put into the hands of defense counsel a week prior to sentencing. Forty-one pages of colloquy were devoted by counsel to exploring and answering the allegations therein (A. 132-173). Analysis of this colloquy reveals that defense counsel were aware of the bases for the government's recommendations and forcefully pointed out the hearsay and asserted irrelevant nature thereof.

In the Seventh Circuit case of *United States v. Solomon*, 422 F.2d 1110 (7th Cir.), *cert. denied*, 399 U.S. 911 (1970), the court was faced with the problem of the effect upon the mind of the sentencing judge of a confidential report on the defendant prepared by the prosecutor in connection with a proceeding for revocation of bail for the trial court's inspection *in camera*. Although the court under the particular facts of that case felt that resentencing was not required, it said:

Hereafter in this Circuit, however, a trial court shall not consider *in camera*, a prosecutor's report about a defendant prior to sentencing or ruling on post-conviction motions unless the pertinent factual information is summarized for or disclosed to defense counsel with appropriate safeguards.

Id. at 1121 (emphasis in original).

Somewhat similar situations have been considered by the courts where there has been non-disclosure by the sentencing judge of presentence reports or other information regarding a defendant from prosecutor to court. If disclosure of a presentence report under appropriate circum-

stances be important, how much more so is the disclosure of a memorandum prepared by the prosecutor containing not only accusations of other crimes but also his own opinion as to the sentences. See generally the discussion of the subject in *Rosner, supra*; *United States v. Brown*, 470 F.2d 285 (2d Cir. 1972); *United States v. Malcolm*, 432 F.2d 809 (2d Cir. 1970); *Haller v. Robbins*, 409 F.2d 857 (1st Cir. 1969); *United States v. Fischer*, 381 F.2d 509 (2d Cir. 1967), *cert. denied*, 390 U.S. 973 (1968). Although a document such as this prosecutor's memorandum may not be utilized by the judge *in camera*, here there was full disclosure and an equally full opportunity to rebut.

The court's sentences here were within the permissible sentences for the crimes charged and we find no reversible error in the sentencing procedure.

Electronic Surveillance:

Pursuant to an order of the trial court dated November 21, 1973, the United States Attorney for the Southern District of New York by letter dated November 29, 1973, specifically inquired of the Assistant Attorney General, Criminal Division, as to any conversations overheard or intercepted by electronic surveillance in which the defendants Vincent, Dioguardi, Lombardo, Savino or Fusco were parties. The reply was negative except as to an October 2, 1964, conversation monitored by the FBI at which Dioguardi was present. Further inquiry revealed nothing thereafter. The Department of Justice in its search covered the Internal Revenue Service, the United States Postal Service, the United States Secret Service, the Bureau of Alcohol, Tobacco and Firearms, the Drug Enforcement Administration, the Bureau of Customs, the Central Intelligence Agency, the United States Department of Labor, the United States Department of Defense and the United States Department of State.

The trial judge was duly notified of the negative results of the requested inquiry. Copies of the correspondence between the United States Attorney, the Department of Justice and the trial judge were sent to all appellate counsel. We find that this inquiry constitutes full compliance with the trial court's order and with the principles enumerated in *United States v. Smilow*, 472 F.2d 1193 (2d Cir. 1973).

Other Allegedly Prejudicial or Irrelevant Testimony:

Appellants contend that the prosecution intentionally introduced inflammatory testimony with no object other than to prejudice the jury against the defendants. The use of nicknames was brought out, e.g., Charles San Filippo, as "Charlie Lamb Chops", Vincent as "Big Vinny", Philip Yovanovich as "Philly Rags", Fusco as "Checko Brown". The fraudulent broker, Gary Fredericks, was identified as a brother-in-law of Sonny Franchese, a rather publicized criminal. References were also made to Jimmy Hoffa and the Teamsters Union. Although this prosecution practice is to be condemned, the expressions, whether they be nicknames or underworld words of art (e.g., "sit-down", "with", "honorable man", "audience" and "hangout") will not be presumed to have had such contaminating significance in the minds of the jurors as to have deprived the defendants of a fair trial. Both prosecution and defense counsel were dealing with defendants and witnesses who in many instances had been steeped in crime. For their respective advantages counsel did not minimize this fact. The witnesses frequently resorted to their own jargon. Our task is to try to estimate its effect on the jury in light of a resolution of the "fair trial" question. Of necessity this appraisal must be made on the basis of its effect upon this court. Against the background of an eight weeks' trial

with scenes frequently emotional, we do not believe that these epithets occasionally interspersed throughout the testimony materially diverted the attention of the jury away from their task.

Conclusion:

In final analysis the question to be answered, after a review of the indictment, the appendix, the transcript and the voluminous briefs of all four appellants, is: have they had a fair trial? The indictment put them on notice as to the charges against them. For eight weeks appellants concentrated upon the lack of credibility on the part of their accusers. They did not seriously question Hellerman's stock swindle—only their connection therewith. The court's charge, although it could have defined and stressed the elements of the crimes charged in the various counts with greater specificity, adequately presented the factual issues for jury determination. For these reasons we affirm the judgments of conviction as to appellants Lombardo, Dioguardi and Vincent Aloi and reverse as to appellant Savino.

6088

365-2-4-75 USCA-4081

JS:iw

REQUEST NO. 24

Elements of Count 18

Count 18 charges as follows:

[Please read Count 18]

The relevant statute is violated if the government has proven the following elements beyond a reasonable doubt.

First: That a defendant, co-conspirator or other person, in connection with the offer or sale of a security, used an offering circular which was false and misleading in light of the circumstances then existing.

Second: That the defendant under consideration by the jury, did so wilfully and knowingly or caused others to do so wilfully and knowingly.

APPENDIX "B"

JS:ko

REQUEST NO. 31

Knowingly and Wilfully Generally

As I indicated to you earlier, before you can convict a defendant, you must find beyond a reasonable doubt that he acted knowingly and wilfully.

An act is done knowingly if it is done voluntarily and purposely and not because of mistake, accident, mere negligence or any other innocent reason.

An act is wilful if it is done knowingly, deliberately and with a bad motive or purpose.

In determining whether a defendant has acted knowingly and wilfully, it is not necessary for the Government to establish that the defendant knew that he was breaking any particular law.

Adapted from United States v. Hardi,
supra, 26414-18.

APPENDIX "B 1"

OFFICE OF THE DISTRICT ATTORNEY
COUNTY OF KINGS

-----X
IN THE MATTER
-----X

OF

NOTICE OF AN EAVESDROPPING WARRANT
AUTHORIZING INTERCEPTION OF COMMUNICA-
TIONS OVER TELEPHONE INSTRUMENTS NUMBERS

NOTICE

PURSUANT TO SECTION
700.50 SUBD. 3. C.P.L.

497-9617, 456-9551, 382-9888, 382-9889,

497-9617, 381-6785, 366-9345, 456-9629,

326-7379.

: THIS WAS phone in
: SOCIAL CLUB.

-----X
YOU ARE HEREBY NOTIFIED that pursuant to Court Order
an Eavesdropping Warrant was issued authorizing the interception of
telephonic communications and conversations on the hereinafter
mentioned telephone instruments.

1. 497-9617 Issued by Justice HYMAN BARSHAY for such
period commencing on the 14 day of May, 1973 and terminating on the
10 day of July 1973.

2. 465-9551 Issued by Justice IRWIN BROWNSTEIN for
such period commencing on the 10 day of July 1973 and terminating on
the 7 day of September 1973.

3. 382-9888, and 382-9889 Issued by Justice HENRY
MARTUSCELLO for such period commencing on the 14 day of June 1973
and terminating on the 10 day of December, 1973.

4. 497-9617 Issued by Justice HYMAN BARSHAY for
such period commencing on the 19 day of November 1973 and terminating
on the 15 day of February 1974.

5. 381-6785 Issued by Justice HYMAN BARSHAY for
such period commencing on the 6 day of December 1973 and terminating
on the 4 day of January 1974.

APPENDIX "C"

6. 366-9345 Issued by Justice HYMAN BARNHART for such period of time commencing on the 17 day of December 1973 and terminating on the 15 day of January 1974.

7. 456-9679 Issued by Justice HYMAN BARNHART for such period of time commencing on the 14 day of December 1973 and terminating on the 18 day of May 1974.

8. 326-7379 Issued by Justice HYMAN BARNHART for such period of time commencing on the 4 day of January 1973 and terminating on the 7 day of February 1974.

YOU ARE FURTHER NOTIFIED that during the above mentioned period of authorized eavesdropping conversations were in fact intercepted and overheard.

Dated: Brooklyn, New York

1974

EUGENE GOLD
District Attorney
Kings County

POINT VIII

THE SENTENCE IMPOSED WAS BASED
UPON MISAPPREHENSIONS OF LAW AND
FACT AND WAS DETERMINED IN A
PROCEEDING WHICH DEPRIVED ALOI
OF THE MINIMUM REQUIREMENTS OF
DUE PROCESS OF LAW

The jury found Aloi guilty of one count of conspiracy, one count of issuing a false financial statement, and one count of wire fraud.

Judge Knapp, in an unusual procedure, requested the United States Attorney's Office to make specific recommendations on sentencing. This was done through a memorandum of law¹³³ which provided purported "factual" summaries of the "criminal" activities of all four defendants, and recommendations that, inter alia, Messers Aloi and Dioguardi receive maximum terms on each count.

Judge Knapp also received and relied upon a presentence report which was turned over to counsel for the various defendants.¹³⁴

On the date of sentencing the Assistant United States Attorney argued

¹³³ This memorandum is part of the Supplemental Record on Appeal.

¹³⁴ At the outset we should note that we are not here involved with the controversy over disclosure of presentence reports which has plagued this and other courts in the past. See, e.g., United States v. Fischer, 381 F.2d 509 (2d Cir., 1967), cert. denied, 390 U.S. 973 (1968); Lehrich, The Use and Disclosure of Presentence Reports in the United States, 47 F.R.D. 225 (1969) (hereinafter "Lehrich"); 8a Moore, Federal Practice, 32.03(4) (Cipes ed., 1973) and which has finally been settled by the introduction of new Rule 32 of the Federal Rules of Criminal Procedure (effective July 1, 1974).

APPENDIX 'D'

at length¹³⁵ that Aloi was

A person who is a very powerful person in organized crime. . . . [who] since 1952 . . . has engaged in increasingly serious violations of law and, at the same time . . . has been carving out a niche for himself in the world of organized crime.

[A. 137, 134]

According to Schreiber, Aloi

. . . seeks to maintain an illusion to the world and perhaps to this Court that he is basically a legitimate businessman who had really no connection with this crime whatsoever. . . . [and that he] has been put on payrolls of companies to create the appearance of legitimacy where in fact there is none.

[137, 138]

In fact, however (according to Schreiber), "he is reputed to be reliably the head of the organized crime family in New York" (A. 134). Schreiber then detailed an alleged death threat made by Aloi to Hellerman which was based on unsworn, unchallenged statements made by Hellerman (A. 139).¹³⁶

He further argued that Aloi was responsible for the death of Joey Gallo; that

he first sought unsuccessfully to line Joey Gallo to a sit-down on the pretense of resolving

¹³⁵In order to appreciate the full impact of the prosecutor's remarks and the judge's statements, a full reading of the sentencing minutes (A. 132-73) is necessary. What follows is merely typical.

¹³⁶It would be futile at this point to restate all of the reasons why Hellerman's "remarks" are entitled to no credibility whatsoever. See Point IV of Appellant Dioguardi's Brief, incorporated here pursuant to Rule 28(i) F.R.A.P.

problems that had developed in his particular organized crime family.¹³⁷

[A. 139]

Finally, when this attempt to kill Gallo failed,

Vincent Aloi authorized an open contract to murder Joey Gallo and the murder was actually carried out by his associates.¹³⁸

[A. 139-40]

Defense counsel attempted to answer these statements, but virtually every argument made was answered, in an adversarial fashion, by the judge himself.¹³⁹ As Mr. Lewis so aptly put it:

. . . these are things that are coming up now in an effort to tar and feather this man and that sounds like a re-enactment of The Godfather in this courtroom. There is a scenario that has been drawn up by the United States Government.

[A. 146]

In referring to the presentence report, Mr. Lewis pointed out that it was based on allegations obtained entirely through double and triple hearsay; by statements allegedly made by the F.B.I. based on information from other sources. He specifically requested an opportunity to rebut the information contained in the report, and stated,

That is what I ask in this particular case.
Let the government produce evidence, proof

¹³⁷ Aloi's alleged membership in the so-called Columbo family was a favorite topic of Mr. Schreiber's during the trial as well, and he made numerous attempts to interject it into the jury's determinations. Failing in this, he redoubled his attack on the judge, who was apparently more susceptible.

¹³⁸ Far more offensive and lurid discussion of this and other criminal incidents (loansharking, etc.) appear in the Government's Memorandum on "Recommendations."

¹³⁹ See A. 142-45.

before your Honor that these accusations of lawlessness, of criminal activity, of killings, of ordering people to do things, be proved to your Honor's satisfaction--to denigrate an individual by character assassination, by hearsay upon hearsay, I say is manifestly unfair.

[A. 147-48]

After substantial further discussion, Judge Knapp made, inter alia, the following observations:¹⁴⁰

This case in a sense poses a dilemma. These are various facts about other things except what is involved in this case, the probation report and the sentence, in that the writer, the probation officer said it was beyond his power to separate fact from fiction and I am afraid it is beyond my power too.

[A. 153-54]

Judge Knapp assumed that:

[Aloi]--certainly--knew something about the Gallo killing and he did not wish it disclosed.¹⁴¹

He said that the government

. . . could have put in testimony [about conversations between and Buster Alois] from which threats could be readily adduced.¹⁴²

[A. 155]

¹⁴⁰His entire "statement" is reprinted at A. 153-57.

¹⁴¹At this point in his remarks, he said he couldn't rely on the "implications of the state conviction and in imposing sentence, because if "the conviction is reversed, the impropriety of my so relying would be obvious" (A. 154). Only minutes later, however, in discussing bail, he made it clear that he accepted it and its "implications" stating: "I can see no logic in [Alois] having lied about it unless he was in some way involved in that killing" (A. 169). See also A. 170 and A. 171 for similar statements.

¹⁴²This statement is indicative of the confusion repeatedly engendered by statements, acts, etc., attributed to Buster rather than Vincent, and which literally and tragically demonstrate an instance of a son punished for the sins of his father.

He stated that the conviction

. . . makes no sense unless this defendant exercised considerable power over these people and exercised it for criminal purposes.

[A. 156]

and, finally,

. . . that Mr. Aloi and Mr. Dioguardi are equally of importance in the case that was tried before me with the modification that Mr. Aloi did not commit perjury¹⁴³ and I think the appropriate sentence would be the same sentence that I administered to Mr. Dioguardi ex [sic] the extra imposed for perjury.

[A. 157]

Whereupon Judge Knapp sentenced Aloi to five years on the conspiracy count and four years on the false financial statement, those sentences to run consecutive to each other and consecutive to the prior State sentence (A. 157).

A five year sentence on the wire fraud conviction was suspended, and the maximum fines permissible were imposed on each of the three counts (A. 159).

Aloi strongly contends that the sentence was illegal and unconstitutionally obtained in that:

- (a) the sentence imposed was entirely inconsistent with the judge's remarks;
- (b) the judge's reasons for imposing such an extreme sentence were improper and incorrect;
- (c) the presentence report considered enormous amounts of entirely improper and incorrect information which should not have been considered by the judge;

¹⁴³ As is more fully contended in Appellant Dioguardi's brief, reliance on alleged perjury in increasing sentence is entirely improper, e.g., United States v. Scott, 419 F.2d 264 (D.C.Cir., 1969). We mention it here only as one more instance of the many improper considerations which were permitted to influence sentencing in this case.

(d) the prosecutor's memorandum of recommendations should not have been requested or considered, and was improper, inflammatory and inaccurate; and

(e) the defendant was denied any effective means of rebutting the above.

Although they are interrelated, and necessarily overlap, we will attempt to deal with these contentions seriatim.

(a) Judge's Error of Fact

Judge Knapp found that Aloi was equally responsible for this stock fraud with Dioguardi¹⁴⁴ and announced that he was giving them equal sentences, with the exception of an additional year for Dioguardi's alleged perjury. While this was his clearly stated intention, the sentences imposed did not achieve that result.

Dioguardi was already serving a sentence of nine years on his conviction in the so-called "Belmont" case, 71 Cr. 558, and his two consecutive five year sentences (on counts 1 and 18) were imposed concurrent to that sentence. Assuming no reversal on either conviction, Judge Knapp effectively imposed a one year sentence on Dioguardi.¹⁴⁵

¹⁴⁴We believe this statement is totally unsupported by the record. See the Statement of Facts in Appellant Dioguardi's brief, incorporated herein. The key to and master mind of the fraud was Hellerman and he was acting, according to the government's view, as Dioguardi's man. Ralph Lombardo, whose participation was peripheral in comparison to Hellerman's was Buster Alois "man," not Vincent's. In addition, Graifer's frequent trips to Florida--rather than to Suffern, New York--conclusively demonstrate that it was Buster, not Vincent who had the power to put together or halt the alleged deal. By the government's own case, Vincent was little more than an on-the-spot "go-fer" who was, for geographical reasons, able to carry out his father's instructions. None of these facts are, of course, conceded.

¹⁴⁵In fact, the effect is even less, since on sentences of 10 years or over, a prisoner is eligible for 2 more "good time" days per month than a prisoner sentenced to anything less than 10 years. Assuming Mr. Dioguardi earns all his good time days, i.e., about 220, he will actually serve only 145 days on this conviction.

Aloi's sentence of nine years was, however, specifically ordered to run consecutively to his state sentence of seven years. Accordingly, Mr. Aloi faces a total of sixteen years while Mr. Dioguardi faces a total of ten, but Mr. Aloi's maximum federal sentence on this crime will be some eight and two thirds years more than his "equally responsible co-defendant"!

(b) The Judge's Reasons

First, and crucial, is the judge's departure from the general run of sentences which are imposed in stock fraud cases like this one.¹⁴⁶ There can be no question that nine years is an extremely harsh penalty for the crime¹⁴⁷ of which Aloi was convicted.

Added to this is the extraordinarily harsh and equally unusual fact of sentences both consecutive to each other and to the state sentence previously imposed. See Moore, supra, 32.04(6) at pp. 32-73.¹⁴⁸

¹⁴⁶ This court has often decried the "sorry parade of such cases which it is called upon to review, and the sentences normally imposed cannot have escaped this Court's notice. See, e.g., United States v. Kelly, 349 F.2d 720 (2d Cir., 1965).

¹⁴⁷ A study recently completed by the United States Attorney's Office for the Southern District of New York indicates that "only 66% of those convicted for securities fraud--received prison sentences (with an average term of one year and seven months for those without prior criminal records)," and that the likelihood of imprisonment on a securities fraud conviction in all federal courts was an astounding 21.5%. Whitney North Seymour, Jr., 1972 Sentencing Study for the Southern District of New York, N.Y.S. Bar Journal, 163, 164, 165 (April, 1973).

¹⁴⁸ Usually, the courts will impose concurrent sentences, particularly where the multiple counts are based on a single criminal act or transaction. Id. The rare instances in which this does not occur are those "where a court in effect throws the book at the offender. . ." Remarks of Professor Herbert Wechsler, Second Circuit Judicial Conference on Appellate Review of Sentence, 32 F.R.D. 249, 289 (1902) (hereinafter "Circuit Conference").

Based on a reading of all the judge's remarks at sentencing, the only possible rationale for this extraordinary sentence was his belief that Aloi was a high figure in organized crime, responsible in some way for the Gallo murder, and in some respect the "mastermind"¹⁴⁹ and moving force of the conspiracy tried before him.

The first two assumptions are entirely unsupported by any competent evidence of any kind¹⁵⁰ and cannot and should not be permitted to influence the sentencing of a defendant convicted of a particular, and, it must be noted, non-violent, crime. The latter assumption is entirely unsupported by the record (See, Point I, supra, fn.144, supra).

Treating offenders as members of a class in sentencing is impermissible whether the class is defined by the offense committed, see United States v. Baker, 487 F.2d 360 (2d Cir., 1973); Woosley v. United States, 478 F.2d 139, 143-45 (8th Cir., 1973) (en banc), or by membership in a race or group. The latter, which occurred in the instant case, is no more than guilt by association.

As Judge Herlands has forcefully stated, with regard to another reputed "Mafia" leader:

¹⁴⁹ Other unquestioned "masterminds" in similar cases have received far shorter terms while inflicting far greater damage on the investing public, e.g., United States v. Hayutin, 398 F.2d 944 (2d Cir., 1968), cert. denied, 393 U.S. 961 (1969) (2-1/2 years concurrent on each of 14 counts); United States v. Doyle, 348 F.2d 715 (2d Cir., 1965) (3 years, with execution suspended after 3 months).

¹⁵⁰ We here accept, for the sake of argument, the fact that certain kinds of hearsay evidence are admissible in sentencing determinations, but do not concede that such hearsay should be entirely unbridled. See United States v. Weston, infra.

A sentence must be "based upon constitutionally permissible factors and, if based "upon clearly erroneous criteria," it may be vacated. *United States v. Mitchell*, 392 F.2d 214 (2d Cir. 1968). Cf. Majority and dissenting opinions in *Verdugo v. United States*, 402 F.2d 599 (9th Cir., 1968).

An alleged association with suspected or notorious criminals or a reputation for such association is not the equivalent of an "arrest." Even an "arrest" cannot validly be treated as a "conviction" for sentencing purposes. To do so would contravene due process of law. *Townsend v. Burke*, 334 U.S. 736, 68 S.Ct. 1252, 92 L.Ed. 1690 (1948). See Note, *Procedural Due Process at Judicial Sentencing for Felony*, 81 Harv. L. Rev. 821 (1968).

A defendant's associates and his reputation are, of course, relevant biographical circumstances to be considered by the Court, along with other pertinent data, in evaluating the defendant's background, personality and characteristics and in forming a comprehensive judgment. *Williams v. New York*, 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed. 1337 (1949)

But even in *Williams* Mr. Justice Black, writing for the majority, noted that the sentencing procedure is not immune "from scrutiny under the due process clause." (337 U.S. at 252, n. 18, 69 S.Ct. at 1084).

Consequently, the defendant's alleged underworld associates and his alleged status in the Mafia or Cosa Nostra cannot and do not constitute a predicate or criterion for punishment.

[*United States v. Rao*, 296 F.Supp. 1145, 1148-49 (S.D.N.Y., 1969)]¹⁵¹

¹⁵¹ Significantly, in that case, much of the information about Rao's alleged underworld activities grew out of his participation in the so-called Appalachia meeting. Rao was convicted of perjury with regard to some questions about alleged narcotics involvement but the count dealing with Appalachia was severed and he was never tried on it. The analogy to Aloi, who allegedly lied about his presence in an apartment, but who was never indicted or tried for the Gallo killing--or perjury about it--is clear.

The purpose of criminal conspiracy statutes, invoked in this case, is to punish unlawful association for particular acts. General association may not constitutionally be punished either directly, e.g., Scales v. United States, 367 U.S. 203 (1961); United States v. Spock, 416 F.2d 165, 171-74 (1st Cir., 1969); or indirectly, United States v. Rao, supra, and should, in any case, not even be alleged when based upon conjecture and projection which cannot "separate fact from fiction." Cf. Masiello v. Norton, 14 Crim. L. Rptr. 2107-08 (D.Conn., October 12, 1973).¹⁵²

The evidence of other crimes, particularly the Gallo murder should not, as contended more extensively infra at (c) affect a sentence determination. The Supreme Court has recently held that sentence may not discretionarily be increased by virtue of prior convictions obtained without counsel. United States v. Tucker, 404 U.S. 443 (1972). The rationale of such exclusion from the judge's determination is that

152 In that case, another alleged "Mafia son" was punished for the sins of his father, the well-known "Gentleman John." In attacking the Parole Board's refusal of parole he alleged denial of due process because he had been summarily designated o/c (organized crime) thus necessitating a different from of parole review (as well as other internal prison restrictions) than other prisoners. Judge Zampano agreed that such a determination was permissible if based on "a reasonable basis in fact" but found such basis lacking where the designation was given "solely on the basis of the allegations contained in his presentence report." Like the report in the instant case, it "contains the usual factual background which is of aid to a sentencing court, but, in addition, it is replete with hearsay, inferences and conclusions concerning alleged connections between the Masiello family and organized crime. . . . The presentence report 'discloses no identifiable sources for the many adverse accusations, nor does it even classify them as 'reliable.' . . . [The Board] . . . apparently accepted at face value some loosely-worded, unsupported assertions and, in haste, determined that Masiello was a key figure in organized criminal activities' Id. at p. 2108. Accordingly, a new hearing, in which Masiello could contest these allegations, was ordered.

[to] permit a conviction obtained in violation of Gideon v. Wainwright to be used against a person either to support guilt or enhance punishment for another offense--is to erode the principle of that case.

[Id. at p. 449, quoting from Burgett v. Texas, 389 U.S. 109, 115 (1967)]

This statement in turn requires examination of the "principle" or rationale of Gideon¹⁵³ itself, which is no less than the unreliability¹⁵⁴ of a conviction obtained without the presence of counsel who can insure that a fair trial is had. See Gideon v. Wainwright, 372 U.S. 335, 343-44 (1963).

If the "principle" of Gideon is offended by sentencing reliance on crimes determined after conviction but without counsel, how much worse is reliance on crimes where not only was there no counsel, but no conviction as well!

(c) The contents of the presentence report

As we have argued above, the judge could not constitutionally consider other "crimes" allegedly committed by Aloi when those "crimes" did not result in arrest, indictment or conviction. The presentence report (and the prosecutor's recommendations, see infra) was, however, composed almost entirely of allegations of such crimes and of generalized "criminal" behavior which as the judge himself later stated "could not separate fact from fiction." This was entirely

¹⁵⁴ Justice Stewart, writing for the majority in Tucker did just that. See Tucker, supra, pp. 447-48 fn. 5.

¹⁵⁵ The issue of "unreliability," going to the "integrity of the fact finding process," is stressed again and again in the retroactivity cases, e.g., Linkletter v. Walker, 381 U.S. 618 (1965); that lack of "reliability" is precisely the reason why Gideon itself was applied retroactively.

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improper.

The issue of sentencing reliance even on provable criminal acts is wide open, e.g., Lehrich, supra, at p. 236. Many courts refuse to allow consideration of any prior criminal acts unless there is proof of an actual, constitutionally valid conviction.¹⁵⁷ The Fourth Circuit, in laying down minimal standards for presentence reports, has stated

No convictions or criminal charges should be included in the report or considered by the court unless referable to an official record.

[Baker v. United States, 388 F.2d 931, 933-34 (4th Cir., 1968)]

This is also the view of the American Bar Association, which specifically found that all arrests and other dispositions short of judgment should be excluded from presentence reports. ABA, Project on Standards for Criminal Justice, Probation, p. 37 (Approved Draft, 1970).

156 As Judge Frankel has written, discussing the uncontrolled information in the presentence report: "What ought to be perfectly clear . . . is the intolerable risk of error when we rely for grave decisions of law on untested hearsay and rumor. Our trial procedures eschewing such reliance presumably rest upon the solid experience of centuries. . . . We should have learned from repeated examples the dangers of secret 'facts' from unnamed informers. But we continue to operate in our sentencing practice as if we had no such knowledge." Frankel, Criminal Sentences, Law Without Order, p. 32 (1973).

157 For example, the Third Circuit has required that all prior convictions listed in the presentence report must be turned over to the defendant, regardless of a judge's other policies on non-disclosure, so that counsel may rebut any inaccuracies. The court found that because only convictions were involved, the presentence report was likely to be accurate, "But it may also contain information which is inaccurate since the report may not list convictions which were later reversed or modified. Moreover, it may even list 'convictions' which are unrelated to the defendant or mistakenly attributed to him." United States v. Janiec, 464 F.2d 126, 129 (3d Cir., 1972). Obviously "crimes" unrelated are even less acceptable.

If prior crimes which have resulted in something short of constitutionally supported¹⁵⁸ conviction, may not be included in a presentence report, surely the unsupported allegations of various uncharged criminal acts¹⁵⁹ contained in the instant report were doubly impermissible.

For the reasons set forth above, see especially Masiello v. Norton, supra, the presentence report's unsupported characterization of Aloi as a leading figure in organized crime was equally unlawful. The quantum of evidence which must, consistent with notions of fairness and due process, be alleged before such allegations can be made is surely greater than the innuendos which occurred here. United States v. Weston, 448 F.2d 626 (9th Cir., 1971), cert. denied, 404 U.S. 1061 (1972).¹⁶⁰ Masiello, supra.

¹⁵⁸See Tucker v. United States, supra.

¹⁵⁹We do not believe that any of our discussion as it pertains to the instant case, is in conflict with any rule in this Circuit. The leading case, United States v. Doyle, 348 F.2d 715, 721 (2d Cir., 1965), has sometimes been baldly cited for the proposition that "evidence of other crimes for which the defendant was not convicted is admissible," e.g., United States v. Cifarelli, 401 F.2d 512, 515 (2d Cir.) (per curiam), cert. denied, 393 U.S. 987 (1968). An examination of the facts of that case demonstrates, however, that it supports no such generalized statement. In Doyle, the "prior criminal acts" were actually charged in the indictment to which Doyle ultimately pled. Because his plea was only to one count, he argued that evidence as to the circumstances of the other counts was inadmissible. This Court rejected his argument as "ludicrous" stating that Doyle, "by adhering to his [plea of not guilty] could have had a public trial where he could dispute all the Government's charges. . ." Doyle, supra, at p. 721. No such "trial" was available--or justified--as to such crimes as the Gallo murder.

¹⁶⁰In that case, Weston was characterized by the presentence report as a major narcotics dealer. This conclusion, which clearly resulted in increased punishment, was based only on "the opinion of unidentified personnel in the Bureau of Narcotics and Dangerous Drugs and the unsworn statement of one agent that an informer had given him . . . information lending . . . support to the charge." Id. at p. 633. The Court found that it would have been virtually impossible to "prov[e] the negative" of this charge and a "great miscarriage of justice to expect Weston . . . to assume the burden and expense of proving . . . she is not the large scale dealer that the anonymous [cont'd next page]

One commentator, discussing the area generally, and Weston specifically, has made an interesting and useful analysis. He reads Weston as finding a reversible "abuse of discretion" unless the information used in a presentence report is "persuasive of the validity of the charges there made" Id. at p. 634. Because the Court pointedly compares this with the information required for a valid search or arrest warrant, he believes that it is implicitly applying a test of probable cause to the presentence report--and approves this as a general formula consistent with a sentencing court's need for information and the defendant's need for fairness or due process.¹⁶¹ Note, Criminal Procedure: Probable Cause and Due Process at Sentencing, 50 N.C. L. Rev. 925 (1972).

We would argue that no evidence of prior crimes which have not resulted in conviction should be permitted. Even under the lesser probable cause test, however, the information contained in the instant presentence report was entirely improper, because "a rational penal system must have some concern for the probable accuracy of the informational inputs in the sentencing process."

Weston, supra, at p. 638.

informant says that she is" Id. at 634: The Court vacated the sentence saying that Townsend v. Burke is extended "but little in holding that a sentence cannot be predicated on information of so little value. . ." Id. at 638.

¹⁶¹"Certain similarities between an affidavit for issuance of a warrant and a presentence report easily lead to such an analysis. Both frequently are based on information from informers or other unsworn statements. Both can be based on evidence not legally competent in a criminal trial. Hearsay can be the basis for the issuance of a warrant just as it can be the basis for a trial judge's determination of sentence." Id. at pp. 933-34. The application of the probable cause standard will also, it is argued, provide appellate courts with reasonable and familiar standards for review.

(d) The Prosecutor's Recommendations

Everything which may or has been said about the Presentence Report can be repeated about the "report" submitted by the prosecutor, a "report" which reads more like a script for "Mission Impossible" than a legal document upon which a defendant's future ought to depend.

Such a document itself is highly suspect. See Haller v. Robbins, 409 F.2d 857 (1st Cir., 1969)¹⁶² and under no circumstances may it be employed to influence a judge without disclosure and an opportunity to rebut,¹⁶³ see United States v. Allsenberrie, 424 F.2d 1209 (7th Cir., 1970).

The better rule seems to require exclusion altogether, especially when a presentence report is available.

Where the court has an objective (or relatively objective) source of background information, there can be little justification for relying upon an obviously subjective or partisan force.¹⁶⁴

[8a Moore, Federal Practice, 32.94(3)
(Cipes ed., 1973)]

¹⁶² As that court pointed out, "However impartial a prosecutor may mean to be, he is an advocate, accustomed to stating only one side of the case...." Id. at p. 859.

¹⁶³ In Haller, supra, although the prosecutor's ex parte report might later be made part of his statement in open court, the First Circuit found "At a minimum, to permit only tardy rebuttal of a prosecutor's statement . . . is a substantial impairment of the right to the effective assistance of counsel to challenge the state's presentation." Cf. Mempa v. Rhay, 389 U.S. 128 (1967).

¹⁶⁴ This is especially true after a hotly contested trial because, according to Moore, "Prosecutors do not gain their reputations from cases in which defendants plead guilty. . . . in the contested case . . . often the 'big' case . . . the prosecutor's success seems to be measured not simply by the conviction obtained but by the severity of the penalty imposed after conviction." Id.

And see ABA, Project on Minimum Standards of Justice, Sentencing, Section 5.3(6) (Approved Draft, 1968).

The report in the instant case graphically illustrates the dangers of an overly partisan (and factually unsubstantiated) presentation. We can only speculate how much it influenced the sentencing judge, but it was inherently so prejudicial¹⁶⁵ that its admission should be deemed a violation of fundamental fairness.

(e) The Right to Effective Rebuttal

Many courts have permitted the use of otherwise questionable information at sentencing only because the defendant was given an opportunity to deny or rebut that information and did not do so, e.g., United States v. Cross, 354 F.2d 512, 514 (D.C.Cir., 1965), United States v. Strauss, 443 F.2d 986 (1st Cir.), cert. denied, 404 U.S. 851 (1971).¹⁶⁶ Cf. Williams v. New York, 337 U.S. 250 (1949).

This is true because reliance on inaccurate information at sentencing may rise to the level of a constitutional violation under Townsend v. Burke, 334 U.S. 736 (1948), e.g., United States v. Malcolm, supra, at p. 819, where it appears that inaccurate information has been used by a sentencing judge appellate courts

¹⁶⁵As well as cumulative of all the hearsay, prior crime errors in the presentence report.

¹⁶⁶In Strauss, the trial judge was permitted to consider information that the defendants were members of a criminal syndicate, but this information was based on sworn testimony before two Senate committees (thus distinguishing it from Rao and Masiello, supra) and, of equal significance, both counsel and defendants were afforded an opportunity to rebut. Strauss, Id., at pp. 990-91.

will remand to give the defendant an opportunity to rebut.¹⁶⁷ United States

v. Espinosa, 481 F.2d 553 (5th Cir., 1973), United States v. Malcolm, supra.

Likewise, in the sentencing procedure itself the court should advise the defendant of the facts considered against him and accord him a "fair opportunity to controvert them." ALI, Model Penal Code Section 707(5) (Proposed Official Draft).

The question of what constitutes an adequate ability to rebut has, however, been vigorously debated. See, e.g., Note: Due Process in Felony Sentencing, 81 Harv. L. Rev. 821 (1968); Lehrig, supra.

A number of courts have already ruled that, where substantial issues of fact are disputed, a hearing must be held, e.g., United States v. Battaglia, 478 F.2d 854 (5th Cir., 1972); United States ex rel Brown v. Rundle, 417 F.2d 282 (3d Cir., 1969), after remand, 427 F.2d 223 (3d Cir., 1970). Based on the holdings of these cases alone, Aloi was entitled to a hearing on the charges against him as requested by his attorney.¹⁶⁸ Failure to permit adequate rebuttal renders the sentence invalid.

He further argues that a succession of Supreme Court decisions beginning with Kent v. United States, 383 U.S. 541 (1966) and culminating in Gagnon v. Scarpelli, 411 U.S. 778 (1973), compel the conclusion that the previously undefined "right to rebut" must now be read to include "minimum requirements of due process," e.g., Goldberg v. Kelly, 397 U.S. 254 (1970).

¹⁶⁷This is true even where only the possibility of reliance is shown, e.g., United States v. Rollerson, 491 F.2d 1209, 1213 (5th Cir., 1974).

¹⁶⁸There is no question that counsel attempted orally to rebut many of these charges--by showing the constant IRS audit, etc., but that faced with their overwhelmingly amorphous nature, he could not do so effectively without an actual hearing.

These include the right to cross-examine which was specifically denied him in the instant case.

Courts wrestling with the problems of fairness in sentencing have continually found themselves faced with the apparently restrictive language of Williams v. New York, 337 U.S. 241 (1949). That case has often been cited for the proposition that due process does not require an adversary hearing at sentencing. Many courts and commentators have noted that the citation goes far beyond what the facts in that case support. See, e.g., United States v. Picard, 464 F.2d 215, 219 (1st Cir., 1972); United States v. Trigg, 392 F.2d 860, 869 (7th Cir.) cert. denied, 391 U.S. 961 (1968); Lehrig, supra, at p. 247. But in any case, as the demands of due process have been significantly expanded since Williams, its broad "holding" is no longer sufficient ground for denying a defendant certain basic rights at sentencing.

In Kent, supra, and In re Gault, 387 U.S. 1 (1967), the Court first re-examined the meaning of due process in proceedings (like sentencing) traditionally characterized as discretionary. Any ambiguity in Kent was dispelled by Gault's specific holding that cross-examination is required in juvenile proceedings.¹⁶⁹

Next, counsel was held constitutionally required at sentencing, Mempa v. Rhay, supra,¹⁷⁰ and a due process hearing was required at a post-sentencing

¹⁶⁹In Kent the Court had refuted the statement that "counsel's role is limited to presenting to the court anything on behalf of the child which might help the court in arriving at a decision." Id. at p. 563. This is a virtually precise description of the role counsel is generally allowed at sentencing.

¹⁷⁰The Court suggested that a particularly strong reason for counsel at the deferred sentencing procedure there employed was that "the eventual imposition of sentence on [a] prior plea of guilty is based on the alleged commission of offenses for which the accused was never tried" Id. at pp. 136-37 (Emphasis added).

procedure where the defendant was subject to possible additional punishment.

Specht v. Patterson, 386 U.S. 605 (1967).

The Court then focussed briefly on sentencing and breathed new life into Townsend v. Burke, supra, by holding that any sentence based upon consideration of a prior record including convictions obtained without a lawyer would be deemed

founded at least in part upon misinformation of constitutional magnitude.

[Tucker v. United States, supra,
404 U.S. at p. 447]

and must, accordingly, be set aside.

Finally, and most recently, the demands of due process have been extended to post-conviction proceedings for revocation of parole, Morrissey v. Brewer, 408 U.S. 471 (1971), and probation, Gagnon v. Scarpelli, supra.

While expressly recognizing that

even though the revocation of parole is not a part of the criminal prosecution, we held [in Morrissey] that the loss of liberty entailed is a serious deprivation requiring that the parolee be accorded due process.

[Gagnon, supra, at p. 781]¹⁷¹

The Court found that, like a trial, revocation of either probation or parole has "two analytically distinct components." These are, first, whether the parolee has in fact acted in violation of one or more conditions of his parole¹⁷²

¹⁷¹Sentencing is, of course, part of the criminal prosecution, Mempa, supra, and thus presumptively entitled to at least as much, if not more, due process than is required in other instances. See Justice Burger's opinion in Morrissey, supra, at p. 480.

¹⁷²This is directly analogous to the guilt determining stage of a criminal trial except that parole violation may be based on somewhat less precise criteria than criminal liability.

and, second, whether the parolee should be committed to prison or should other steps be taken.¹⁷³ Id. at pp. 479-80.

Justice Powell then found that in requiring two hearings to determine these two separate questions, the latter must be "less summary--because the decision under consideration is the ultimate [one]." This latter hearing accordingly must include the following "minimum requirements of due process":

(a) written notice of the claimed violations of [probation or] parole; (b) disclosure to the [probationer or] parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a 'neutral and detached' hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the fact-finders as to the evidence relied on and reasons for revoking [probation or] parole.

[Morrissey v. Brewer, supra, at p. 489]¹⁷⁴

There is no way to square the holdings of this line of cases and Townsend v. Burke with denial of the right, at sentencing, to rebut allegedly inaccurate or incorrect information by cross-examination.

The appellant was, accordingly, denied the due process of law at his sentencing; that sentence must be set aside.

¹⁷³ Similarly, this is the question confronted by the sentencing judge in most situations except where a mandatory sentence is required.

¹⁷⁴ Judge Feinberg has noted that although these cases involve hearings before administrative agencies or boards, there is no reason why fewer safeguards should be required before a judge. United States v. Baker, 487 F.2d 360 (2d Cir., 1973) (Feinberg, J., dissenting on other grounds).